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S. HRG. 99-622

RETIREMENT POLICIES FOR PUBLIC SAFETY OFFICIALS

COMPLETED

231

of 181

ORIGINAL

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

OVERSIGHT ON RETIREMENT POLICY FOR PUBLIC SAFETY OFFICIALS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

MARCH 18, 1986

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CONTENTS

STATEMENTS

Tuesday, March 18, 1986

Page

- Bradley, Hon. Bill, a U.S. Senator from the State of New Jersey 30
- Ford, Hon. Wendell H., a U.S. Senator from the State of Kentucky 5
  - Prepared statement 10
- Grossi, Louis, member, American Association of Retired Persons 164
  - Prepared statement of the American Association of Retired Persons 169
- Heinz, Hon. John, a U.S. Senator from the State of Pennsylvania, prepared statement 191
- Hilycord, David, legislative liaison, Indiana Fraternal Order of Police, prepared statement 223
- Levitt, Mark, deputy director, Office of Labor Relations, National Public Employer Labor Relations Association; Max B. Chiddister, mayor, Goshen, IN, Indiana Association of Cities and Towns; Ronald D. Buckler, deputy attorney general, State of Indiana, National Association of Attorneys General; and Col. Clinton L. Pagano, superintendent, New Jersey State Police 94
  - Prepared statement of Mr. Levitt 98
  - Prepared statement of Mr. Chiddister 124
  - Prepared statement of Mr. Buckler 134
  - Prepared statement of Colonel Pagano 142
- National League of Cities, the, prepared statement 197
- Ng, William, Deputy Counsel, Equal Employment Opportunity Commission, accompanied by Kenneth Morse, senior trial attorney, EEOC 33
- Quayle, Hon. Dan, a U.S. Senator from the State of Indiana, prepared statement 2
- Rinaldo, Hon. Matthew J., and William J. Hughes, joint prepared statement 178
- Schaitberger, Harold A., director, Department of Governmental Affairs and Public Relations, International Association of Firefighters; Donald L. Cahill, member, legislative committee, National Fraternal Order of Police; William Summers, director, legal services, International Association of Chiefs of Police; and Robert Bellumo, deputy chief, Baltimore City Fire Department, on behalf of the International Association of Fire Chiefs, Inc 54
  - Prepared statement of Mr. Schaitberger 57
  - Prepared statement of Mr. Cahill 68
  - Prepared statement of Mr. Summers, representing The International Association of Chiefs of Police 73
  - Prepared statement of Mr. Bellumo 89
- Thomas, Clarence, Chairman, U.S. Equal Employment Opportunity Commission, prepared statement 35

ADDITIONAL MATERIAL

- Communications to:
  - Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma, from:
    - Morgan T. Elkins, commissioner, Kentucky State Police, March 31, 1986 5
    - Raymond C. Scheppach, executive director, National Governors' Association, March 14, 1986 129
    - Bob Small, chairman, Governor's Oversight Committee for Mandatory Retirement Age of Public Safety Officers, State of Indiana, February 28, 1986 221

Page

Communications to—Continued
  Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma, from—Continued
    James A. Rhinebarger, senior trooper/investigator, Indiana State Police Department, March 5, 1986 222

RETIREMENT POLICIES FOR PUBLIC SAFETY OFFICIALS

TUESDAY, MARCH 18, 1986

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SD-430, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senator Nickles (presiding).

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. The subcommittee will come to order.

Senator Ford, we are glad that you are here this morning. Today's hearing will focus on an issue that many consider to be yet another intrusion by the Federal Government into matters left best to State and local governments. Just last year, during the first session of this Congress, this subcommittee addressed the Federal Government's imposing all of the requirements of the Fair Labor Standards Act on State and local governments. I am pleased that we were able to correct the more punitive parts of that intrusion through legislation commonly known as the Garcia amendments.

Now this subcommittee has been asked to focus its attention on the Federal intrusion into State and local law enforcement and firefighter personnel hiring and firing practices based on age which are imposed through the Age Discrimination in Employment Act.

Like others who will testify today, I am opposed to discrimination based on age. However, public safety arguments as well as principles of States rights versus federalism will be presented today in an attempt to persuade this subcommittee that relief is warranted.

At this point I will insert in the record a statement of Senator Quayle on this legislation.

[The prepared statement of Senator Quayle follows:]

Senator Dan Quayle

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STATEMENT OF U.S. SENATOR DAN QUAYLE (R-IN) ON BILLS TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT BY EXEMPTING STATE AND LOCAL PUBLIC SAFETY OFFICERS BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE SUBCOMMITTEE ON LABOR

March 18, 1986

Mr. Chairman, I commend you for conducting this hearing on legislation to amend the Age Discrimination in Employment Act (ADEA) to permit mandatory retirement of State and local public safety officers. In addition to my bill, S. 1240, the Age Discrimination in Employment Act Amendments of 1985, the Subcommittee is also examining the provisions contained in S. 698, sponsored by Senator Bradley, and S. 62, sponsored by Senator Ford.

Indiana supporters of an exemption include Governor Robert D. Orr, Attorney General Linley Pearson, the Indiana State Department of Natural Resources, the Indiana State Police, the Police League of Indiana, the Indiana Association of Cities and Towns and many private individuals.

There is also enthusiasm for an exemption at the national level. Among the national organizations supporting mandatory retirement for State and local public safety officers are the National Governors' Association and organizations representing both unions and administrators for police and firefighters. Representatives of many of these groups are participating in this hearing.

I want especially to welcome two Hoosiers who are appearing before the Subcommittee today. The Honorable Max Chiddister, Mayor of Goshen, is presenting testimony on behalf of the Indiana Association of Cities and Towns. On behalf of the National Association of Attorney Generals, Ronald D. Buckler, Deputy Attorney General from Indiana, is testifying.

The main argument in favor of permitting mandatory retirement of State and local public safety officers is to ensure that individuals responsible for protecting the public have the stamina necessary to meet the physical demands of these critical jobs. Public safety officers in federal agencies, such as the FBI, the Secret Service, Drug Enforcement Administration and the military, who often work with State and local police or firefighters, have a statutorily set retirement, usually age 55.

In an effort to ensure the same high standards in Indiana, over 50 separate local public safety entities are engaged in costly litigation with the Equal Employment Opportunity Commission (EEOC). Recently, the State of Indiana lost a case in defense of its statutorily required hiring and firing age requirements for the Indiana State Police. As a result, according to estimates, the cost of this suit will approach a million dollars when consideration is given to possible back-pay awards.

Indiana lost this case because no "bona fide occupational qualification" (BFOQ) had been established to demonstrate a connection between age and the physical requirements of these jobs. Although Indiana is currently conducting a study to establish a BFOQ, its establishment will not eliminate the legal battles. Given the aggressive enforcement policies of EEOC, States and localities would still be subject to litigation in defense of established qualifications, such as periodic testing procedures of uncertain reliability. I know Ron Buckler, with the Indiana State Attorney General's Office, is commenting on this in his testimony.

In 1965, Willard Wirtz, then Secretary of Labor, issued a report which laid the groundwork for the original Age Discrimination in Employment Act of 1967. In this report, "The Older American Worker: Age Discrimination In Employment," Wirtz thoughtfully delineated the various aspects of age discrimination. Significantly, he acknowledged that the difference between age discrimination and other forms of discrimination, such as that based on sex or race, is that age has a demonstrable impact on physical ability and thus, for some jobs or occupations, it may be valid for employers to take age into consideration. This is the basis for the BFOQ provision in the ADEA.

I support the protections against age discrimination established by the ADEA. That is the reason my bill, S. 1240, contains a provision to eliminate its upper age cap of 70 as well as an exemption for State and local public safety officers.

However, as we go forward, I hope there will be some analysis of the specifics of the different proposals now before this Subcommittee to assess their consequences. I hope that we will attempt carefully to weigh the impact of this exemption on the rights and liberties of individual public safety officers. In S. 1240, I included an age limit of 55. This would permit mandatory retirement and refusal to hire starting at the age of 55. Other proposals do not have an age limitation. What is the impact of these differences on retirement policies and other organizational or social policies?

I support an exemption of State and local public safety officers from the ADEA, but I also believe that, as we weigh the benefits to society, we must be careful to ensure that the protections for the individual are not unduly abrogated.

# # #

Senator NICKLES. I am very pleased that Senator Ford has joined us this morning. He has been a leader in this area. He has requested this committee to hold hearings and we are doing it largely at his request. Senator Ford, please proceed.

STATEMENT OF HON. WENDELL H. FORD, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator FORD. Mr. Chairman, I thank you very much and first let me say how much I appreciate your courtesy and understanding. It just indicates that all of us have a desire I think to do what is right for our people. The opportunity you have given me this morning to testify before this Labor Subcommittee on the issue of mandatory retirement for State and local law enforcement and firefighting personnel gives us the chance to discuss how best to provide for the public safety of those we represent.

You and your staff have been most accommodating to me and I appreciate your willingness to hold these hearings. In the interest of time, Mr. Chairman, I will submit my entire statement for the record, along with an attachment from the Kentucky State Police, and then briefly discuss a few of the points raised in my testimony, if that meets with your approval.

Senator NICKLES. Certainly. Thank you.

Senator FORD. Mr. Chairman, I would like to add a supplement to this. We were not able to get it all finished by this morning and it will not be long, but I ask unanimous consent that I might add a supplement to my testimony.

Senator NICKLES. Certainly.

[The material referred to follows:]

COMMONWEALTH OF KENTUCKY
KENTUCKY STATE POLICE
919 VERSAILLES ROAD
FRANKFORT 40601

MARTHA LAYNE COLLINS
GOVERNOR

MORGAN T. ELKINS
COMMISSIONER

March 31, 1986

The Honorable Don Nickles
The United States Senate
Committee on Labor and
Human Resources
Washington, DC 20510

Re: Labor Subcommittee Oversight Hearing on Retirement Policies for Fire Fighters, Law Enforcement Officers, and Other Employees Whose Job Performance Affects the Public's Health and Safety

Dear Senator Nickles:

It is an honor to present these written comments on the experience of the Kentucky State Police and the application of the A.D.E.A. I ask that they be included as a part of the official record.

The Kentucky State Police is primarily a rural law enforcement agency. Its 930 officers have statewide jurisdiction over 40,409 square miles. Each Kentucky State Trooper is responsible for enforcing all criminal and traffic laws in the Commonwealth. Each trooper patrols alone. Manpower allocations do not permit us to have statewide 24-hour patrol, much less allow two troopers to ride in one cruiser.

All sworn officers, regardless of rank, are required to be armed and execute the law. There are no permanent assignments in the Kentucky State Police. All officers are subject to reassignment and transfer at any time.

As I previously stated, the Kentucky State Police are required to enforce all laws in the Commonwealth. The offenders of Part I Crimes, which are defined by the FBI as murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and auto theft, are young. Sixty-seven percent (67%) of all offenders of these violent felonies were under age thirty (30). Seventy-nine percent (79%)

AN EQUAL OPPORTUNITY EMPLOYER M/F/H

were under age thirty-five (35) and eighty-six percent (86%) were under age forty (40). Crimes in Kentucky (1984). See attachment. We must have officers who are able to apprehend these young, violent criminals. A 60-year-old police officer cannot physically compete with a 20-year-old murderer. A 70-year-old cannot run down a fugitive.

Testimony was presented to this Committee which stated that only officers in active law enforcement assignments should be exempted from A.D.E.A. I want to lay to rest the notion that only the troopers need to be exempt from A.D.E.A. All sworn personnel are expected to perform all duties of the Kentucky State Police. Emergencies do not know if one is assigned to a "desk job" or an active law enforcement job. All sworn officers, regardless of age, assignment or any other reason, are expected to perform their duties under exigent circumstances. We cannot lower our state standards of excellence because an officer holds an administrative assignment. The law must be enforced by the individual who is closest to the scene, regardless of his current assignment. It is also more difficult for an officer who is currently in an administrative assignment to execute physical skills because he is not performing them as a routine part of his job. Thus, it requires more physical exertion by someone who does not perform a task on a daily basis.

In conclusion, I ask that you exempt all sworn enforcement officers from the A.D.E.A.

Sincerely,

Morgan T. Elkins,
Commissioner

MTE:CCS:rt

cc: Honorable Wendell H. Ford

TOTAL ARRESTS BY AGE — 1984
ADULT

Of the adults arrested during 1984, 72,046 persons were in the 18-24 years of age group (36.6%). 19% were 25-29 years of age, 13% were 30-34 years of age, and 9% were 35-39 years of age. Arrest for Drunkenness and Driving Under the Influence accounted for 44,079 arrests of persons within the 25-29 years of age group; DUI arrests of persons between 25-29 years of age accounted for 44.3% of all DUI arrests.

PART I CRIMES	18	19	20	21	22	23	24	25-29
Murder & Non-Negligent Manslaughter	6	8	7	4	10	10	9	28
Forcible Rape	29	21	29	22	19	17	28	94
Robbery	63	65	76	60	70	59	47	188
Aggravated Assault	155	157	180	173	193	213	209	768
Burglary	505	406	449	319	248	216	190	545
Larceny-Theft	938	865	792	656	545	536	451	1741
Auto Theft	80	49	47	39	39	40	29	118
Sub Total for Above Offenses	1776	1571	1580	1273	1124	1091	963	3482

PART II CRIMES	18	19	20	21	22	23	24	25-29
Manslaughter by Negligence	0	2	2	2	2	0	2	8
Other Assaults	141	180	196	204	194	205	218	848
Arson	4	12	11	8	11	7	6	42
Forgery & Counterfeiting	109	148	192	115	205	90	89	421
Fraud	127	218	341	284	355	442	424	1665
Embezzlement	0	0	1	6	4	3	1	24
Stolen Property: Buying, Receiving, Possession	220	167	155	136	117	106	104	391
Vandalism	122	97	67	67	72	72	47	180
Weapons: Carrying, Possession, Etc.	111	111	92	109	102	91	112	414
Prostitution & Commercialized Vice	23	38	52	44	50	56	63	147
Sex Offenses (Except Forcible Rape & Prostitution	22	26	34	27	31	27	34	111
Narcotic Drug Laws	586	725	733	777	726	653	730	2245
Gambling	4	4	4	7	8	7	4	39
Offenses Against Family & Children	42	42	34	56	54	53	68	220
Driving Under the Influence	1324	1780	2195	2509	2511	2540	2482	9454
Liquor Laws	620	621	482	123	95	81	63	201
Drunkenness	1936	2452	2817	2908	2865	2736	2744	9847
Disorderly Conduct	396	383	453	533	430	436	442	1426
Vagrancy	5	2	3	1	3	1	2	10
All Other Offenses (Except Traffic)	1345	1527	1780	1626	1535	1624	1560	5985
Curfew & Loitering Laws	0	2	1	0	1	1	1	4
Runaways								
Sub Total for Above Offenses	7137	8537	9645	9542	9380	9231	9196	33,192

GRAND TOTAL	8913	10,108	11,225	10,815	10,504	10,322	10,159	36,674

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TOTAL ARRESTS BY AGE — 1984
ADULT (Continued)

PART I CRIMES	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 And Over	TOTAL 18 & Over
Murder & Non-Negligent Manslaughter	25	28	14	11	4	4	4	5	177
Forcible Rape	55	51	33	10	8	6	3	4	429
Robbery	103	37	23	14	12	5	0	3	825
Aggravated Assault	555	382	257	161	123	72	46	58	3702
Burglary	326	141	89	45	22	13	10	3	3527
Larceny-Theft	1229	744	447	314	255	196	124	157	9996
Auto Theft	66	35	20	12	6	7	4	0	591
Sub Total for Above Offenses	**2359**	**1418**	**883**	**567**	**430**	**303**	**191**	**230**	**19.241**

PART II CRIMES	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 And Over	TOTAL 18 & Over
Manslaughter by Negligence	5	3	1	3	1	0	1	1	33
Other Assaults	576	373	278	171	142	82	46	49	3883
Arson	27	25	16	11	10	3	1	3	197
Forgery & Counterfeiting	276	135	100	64	32	14	5	7	2002
Fraud	1435	883	566	353	218	125	79	43	7548
Embezzlement	19	5	57	25	3	1	0	0	149
Stolen Property Buying Receiving d Possession	255	169	115	65	60	27	17	7	2100
Vandalism	131	74	36	30	17	20	7	5	1044
Weapons Carrying Possession Etc	257	171	117	87	69	57	28	35	1963
Prostitution & Commercialized Vice	60	31	11	4	3	3	1	3	589
Sex Offenses (Except Forcible Rape & Prostitution)	97	116	82	53	31	19	25	29	784
Narcotic Drug Laws	1216	550	259	116	106	48	16	28	9514
Gambling	35	10	23	23	13	13	8	4	197
Offenses Against Family	214	140	103	39	25	16	8	10	1124
Driving Under the Influence	6931	5235	3737	2664	2014	1350	823	545	48.104
Liquor Laws	170	148	130	110	97	67	50	54	3112
Drunkenness	7133	5679	4975	4234	3676	2793	1719	13334	59 648
Disorderly Conduct	875	568	441	265	208	145	80	76	7166
Vagrancy	4	1	1	0	5	1	1	4	44
All Other Offenses (Except traffic)	3934	2759	1851	1159	897	605	332	358	38 587
Curfew & Loitering Law Violations	2	3	1	1	1	0	0	0	18
Runaways									
Sub Total for Above Offenses	**23.652**	**17.078**	**12.900**	**9.477**	**7.828**	**5.389**	**3.247**	**2.595**	**177.786**
GRAND TOTAL	**26.011**	**18.496**	**13.783**	**10.044**	**8.258**	**5.692**	**3.438**	**2.825**	**197.127**

ADULT ARRESTS

177,786 Adults were arrested in 1984.

10% of the adults arrested during 1984 were arrested for PART I Crimes. 52% of the PART I Crime arrests of adults were for Larceny-Theft. 19% for Aggravated Assault, 18% for Burglary, and 3% for Auto Theft.

90% of the adults arrested during 1984 were arrested for PART II Crimes. 34% of those arrests were for Drunkenness and 27.1% were for driving Under the Influence. 5% were charged under Narcotic Drug Laws, 1% for Forgery & Counterfeiting, and 4% for Disorderly Conduct.

Senator **Ford**. Like all of us here today, I am a strong supporter of ADEA. The legislation which I and others of my colleagues have introduced is not a threat—I want to underscore that—is not a threat to the act nor to older workers. We are not seeking to exclude any worker from coverage under ADEA.

We are trying to provide for the health and safety of all individuals by giving State and local governments some flexibility to protect their citizens. And I suspect, Mr. Chairman, those who will testify against our legislation today may be the first to criticize those units of State government when they do not perform in a manner that they would expect.

This legislation does not provide for mandatory retirement for State and local workers. It provides those governments the opportunity to structure their public health and safety protection requirements to best meet their needs.

I found so many times here in Washington when we pass a Federal law we paint with a broad brush. It is very difficult for us to develop legislation that would fit each and every individual community or State.

Mr. Chairman, since 1947, Congress has recognized the need for special retirement provisions for Federal law enforcement personnel. Federal law enforcement and firefighting personnel must retire at age 55. Federal air traffic controllers must retire at age 56. Certain CIA employees must retire at age 50.

Congress recognized the hazardous demands placed on these workers and specifically provided for their early retirement in order to provide the maximum health and safety protection for our citizens.

State and local governments face the same problems in providing for the public safety in their jurisdictions. They need the same flexibility Congress has given to certain Federal agencies.

This is not an age discrimination issue. This is a public safety issue. As a matter of public policy, the Federal Government should not prohibit State and local government from structuring their public safety agencies, namely law enforcement and firefighting, in the manner they determine to be most appropriate for protecting their citizens.

Again, Mr. Chairman, I appreciate the willingness of you to hold these hearings and allow us to address this problem, and I hope the subcommittee will be able to move expeditiously on this matter and I will be pleased to answer any questions that the chairman or the subcommittee may have.

[The prepared statement of Senator Ford follows:]

Testimony of Senator Wendell H. Ford
Subcommittee on Labor
March 18, 1986

Hearing on the Exemption From the Age Discrimination in Employment Act for State and Local Law Enforcement and Firefighting Personnel

MR. CHAIRMAN: I am very pleased to be here this morning to testify before the Senate Labor Subcommittee on the issue of mandatory retirement for state and local firefighters and law enforcement officials. I want to thank the Chairman for being so accommodating to me. This is an issue of great concern to the Kentucky State Police and one which will have a tremendous impact across the country.

In 1983, the Supreme Court held in the case of EEOC v. Wyoming, that the Age Discrimination in Employment Act extends to state and local governments. This decision caused immediate concern in Kentucky. Since 1958, Kentucky statutes governing State Police employment have required that all applicants for employment in the State Police be between age 21 and age 31, and have further required that all sworn personnel retire at age 55. The Wyoming decision effectively invalidates Kentucky law by applying the ADEA prohibitions against age discrimination between ages 40 and 70 to state and local governments.

In June of 1983, then Kentucky Governor John Y. Brown, Jr., brought this situation, and the effect it would have on the Kentucky State Police, to my attention and requested that I investigate the possibility of exempting the State Police from the age provisions of ADEA. Governor Martha Layne Collins reiterated that request and in March of 1984, I introduced S. 2425, a bill which would exempt state law enforcement officials from ADEA. No action was taken on this legislation in the 99th Congress, and on January 3rd of last year, I reintroduced identical legislation, S. 62. Several other bills have been introduced which would provide the same relief for the Kentucky State Police. However, other legislation would also extend the exemption to local governments and to state and local firefighters. I support these measures and want to state that while the legislation I introduced was very narrow and specifically designed to provide relief for what I knew was an immediate problem in Kentucky, I have since found that local governments and state and local firefighters face the same concerns and needs as the Kentucky State Police.

I compliment Chairman Nickels for holding these hearings on the entire issue and I will support legislation which remedies this problem for all public safety agencies affected. This problem is no less onerous for state and local governments than was the problem of overtime pay created by the Supreme Court in its Garcia decision, and I am hopeful that the Subcommittee will move forward on this issue. In the meantime, as anticipated, the EEOC has filed suit against Kentucky on the grounds that its mandatory retirement policy for State Police violates the age discrimination provisions of ADEA.

Kentucky is not alone in this situation. As of March of this year, 33 states or localities had been, or are currently being sued by EEOC on the basis that mandatory retirement or minimum hiring age laws violate ADEA. In addition to EEOC suits, private individuals have also sued the same entity, subjecting fiscally-pressed state and local governments to double litigation costs. The Wyoming decision will affect state laws in 32 states and at undetermined expense for both legal defense, and the results of such litigation, such as back pay orders, or more costly, a restructuring of a retirement system. State and local law enforcement agencies have long recognized early retirement as necessary to both attract and maintain the youthful and vigorous work force which the hazards of the job demand. In light of recent lawsuits by EEOC, retirement policies of state and local law enforcement agencies across the country are being jeopardized. I do not believe that Congress intended to threaten the quality of state and local law enforcement and firefighting protection when it expanded ADEA to cover state and local employees.

The Kentucky State Police, along with state and local law enforcement officials and firefighters across this nation, are not requesting the ability to discriminate against older workers -- they are requesting the ability to structure their agencies so that they can ensure the safety of the public they serve. In fact, state and local governments are only seeking the same flexibility that the federal government currently enjoys.

Since 1947, Congress has recognized the need for early retirement benefits for Federal law enforcement personnel and has provided special early retirement benefits to all Federal employees whose duties are primarily the investigation, apprehending, or detaining of persons suspected or convicted of committing Federal crimes. Throughout the years, Congress has continued to permit Federal agencies the leeway of establishing mandatory retirement ages and minimum and maximum hiring age limits for public safety officers. Currently, Federal law enforcement and firefighting personnel have mandatory retirement at age 55; certain Central Intelligence Agency employees must retire at age 50; while Federal air traffic controllers must retire at age 56 and commercial pilots are required by the Federal Aviation Administration to retire at age 60. State and local governments seek the same flexibility Congress has afforded to certain federal agencies to set mandatory retirement and minimum/maximum hiring ages for similar employees within their jurisdictions.

Congress has consistently maintained that the need for early retirement policies for these employees has been to improve and maintain the quality, efficiency, and productivity of law enforcement activities by making it a "young man's service." In 1974, Congress passed Public Law

93-350 which established, effective January 1978, mandatory retirement at age 55, or upon completion of 20 years of covered service, for all covered Federal law enforcement and firefighting personnel. Congress emphasized in the legislative history of that bill that the special retirement provisions were necessary to ensure a work force young enough to cope with the unusual physical and emotional requirements of those positions. Although there was no floor debate in the Senate on this issue, debate on the House floor clearly indicated the concern of Congress that the goal of mandatory retirement be met: To maintain a relatively young and vigorous staff of law enforcement and firefighting personnel capable of carrying out the demanding and hazardous duties of their positions by replacing older personnel who, because of the stringent physical requirements of their positions and the unusual mental and emotional stress associated with those positions, were no longer able to perform at top efficiency.

The goal of mandatory retirement provisions of State and local law enforcement and firefighting agencies is no less necessary that that expounded by Congress for Federal law enforcement personnel. In fact, the need for special retirement provisions for Federal law enforcement personnel was justified based on State special retirement provisions. And although the need for special retirement benefits for Federal law enforcement and firefighting personnel has been questioned over the years, Congress has let those provisions firmly stand.

In 1978 during debate of legislation which amended the ADEA to raise the mandatory retirement age to 70 for non-Federal employees, the issue of early retirement for Federal law enforcement personnel was raised. Consequently, the House Subcommittee on Compensation and Employees Benefits, House Committee on Post Office and Civil Service, held 6 days of hearings between September 27 and December 1, 1977, on special Federal retirement provisions. The overwhelming feeling of those who testified was that since 1947 Congress had consistently recognized the need for special retirement benefits for Federal law enforcement officials due to the hazardous and demanding duties of their positions and that those duties required a relatively young and vigorous work force which could best be maintained by encouraging early retirement.

Testimony at those hearings indicated that although factors other than age, such as the results of rigorous routine medical exams, might serve as an alternative basis for mandatory retirement, such alternative tests had not been satisfactorily developed by the medical community so as to be workable and dependable. Furthermore, such procedures would be costly to administer and produce unreliable results. Witnesses contended that until methods can be developed which reliably correlate the requirements of a special job and the measurable physical and emotional fitness of an individual employee, age is the only way of measuring fitness. Although age may seem to be an arbitrary measurement, it can be proved that after a certain age, physical ability and activity generally decline. The subcommittee took no action following those hearings to either narrow or repeal the mandatory retirement provisions for Federal law enforcement personel.

When Congress expanded coverage of the ADEA to state and local employees in 1974, there was no indication of what effect this action might have on state and local law enforcement and firefighting personnel either in the committee reports or during the floor debates in the House and Senate. But today, the effects of that extension are being felt in my home State of Kentucky, as well as in many other states and localities which are suddenly finding themselves in court defending mandatory retirement policies for these personnel.

There can be no doubt that the same concerns which have led Congress to uphold mandatory retirement for Federal law enforcement personnel apply equally to state and local law enforcement and firefighting personnel. Their duties are equally hazardous, equally demanding, and equally stressful and similarly require a youthful and vigorous work force. The demands of state and local law enforcement and firefighting personnel equally deserve the recognition that such hazardous service warrants special early retirement policies with generous benefits to compensate for both the rigorous effects of the duties performed and the financial needs of a relatively young retiree.

Medical science has simply not developed a reliable method of testing individuals to determine whether they can continue to perform physically, mentally, and emotionally in high stress positions such as law enforcement and firefighting. The legislation which has been introduced to extend the federal exemption to state and locals governments has been criticized as eliminating individual consideration and legislating stereotypes about the ability of older workers to perform. Let me firmly state that there is no such inference nor intention in the legislation which has been introduced to correct this problem. This legislation does not force these state and local employees to retire from the workforce; it only restricts them from working in the very narrow and limited area of governmental public security. These same individuals are free to entry private security practice, or any other vocation, at the end of their public service career. In fact, because mandatory retirement policies generously compensate employees with more generous retirement benefits, these workers often are free to chose a second career without the financial pressures other older workers face. Such legislation does not prohibit law enforcement and firefighting personnel from working past a certain age, it merely balances public safety concerns with individual concerns and restricts these employees from public law enforcement and firefighting service.

The data on the ability of medical tests to predetermine which individuals could perform in these hazardous jobs past certain ages is mixed at best. There seem to be certain risk factors which can be identified, but not necessarily measured with any consistent degree of accuracy. More importantly, those factors which have been identified are ones which could be even more discriminately applied than a standard age limit. For example, sex, excess body cholesterol, cigarette smoking, family history, hypertension, physical inactivity, and diabetes. It does not take an very active imagination to foresee the potential discrimination which could be practiced if state and local governments were to base length of service on factors such as these. While critics of this legislation seem willing to admit that there is a gradual trend toward physical decline and increased risk of heart disease that accompanies age, they are more more concerned with the individual exceptions to these trends than they are to the potential hazards such trends can produce.

While I strongly oppose employment discrimination in any field, and particularly age discrimination, I do not believe that Congress ever intended to jeopardize public safety when it passed the Age Discrimination in Employment Act. There is balancing to be done in every area of government intervention, and the question here should not be whether we are going to sacrifice the individual rights of a narrow group of state and local employees to work past a certain age, but whether we are going allow state and local government the flexibility to ensure that the individual rights of the public can be protected through dependable law enforcement and firefighting services.

This is not an age discrimination issue; this is a public safety issue. As a matter of public policy, the federal government should not prohibit state and local government from structuring their public safety agencies -- namely law enforcement and firefighting -- in the manner they determine to be most appropriate for protecting their citizens. The concerns for adequate public safety that have lead Congress to provide certain Federal agencies an exemption to the age provisions of ADEA are the same concerns voiced by state and local governments. State and local governments are not seeking the opportunity to arbitrarily discriminate against their employees; they seek only a very narrow exemption from the hiring and retiring provisions of ADEA for a very small population of employees -- only law enforcement and firefighting officials. All other state and local employees would continue to be covered by the age provisions of ADEA, and, perhaps more importantly, even these exempted employees would continue to be protected from age discrimination in promotions, compensation, and other conditions of employment.

The ADEA recognizes that there are certain cases in which age may be a legitimate employment factor, and provides for its consideration in terms of the BFOQ (bona fide occupational qualification) exception. Maximum or minimum service age can be upheld if the government asserting the BFOQ can demonstrate that the age requirement is "reasonably necessary to the normal operation of the particular business." However, the BFOQ is not a workable alternative to the pending legislation. The courts have inconsistently interpreted this standard, and in the area of public safety officials have produced conflicting results. The BFOQ must be relitigated by each different jurisdiction which asserts it, and in recent years, the EEOC has limited its application of a BFOQ to narrow and specific job categories rather than entire occupational job personnel. More importantly, such litigation is extremely costly to pursue and requires the testimony of very expensive witnesses and medical analysis. Kentucky has already spent $100,000 in out-of-pocket expenses, excluding staff time, defending its pending lawsuit, and estimates spending at least $200,000 more.

The cost of litigation is not the only expense associated with this issue. Even more onerous is the potential cost of having a BFOQ denied, which would then require that hiring and retiring provisions be conformed to the 40/70 age limits of the ADEA. Two years ago the Kentucky State Police did an analysis of the impacts of having to conform to the ADEA provisions. Allowing State Police personnel to work until age 70 would cost Kentucky an additional $6 million by the end of the century. A second negative effect would be the decrease in the number of employment position available for promotion. Obviously, if workers must be employed longer, there will be a slower turnover rate for promotions. Additionally, there will be a slower inflow of new and younger workers, all of which will work negatively on morale. Furthermore, Kentucky finds that as a trooper/detective ages, productivity also declines, thereby requiring more personnel to perform the same levels of service. The complete analysis by the Kentucky State Police is included as an Appendix to this statement.

At a time when state and local governments are being called upon to fund an increasing number of services and programs formally provided by the Federal government, Congress must be keenly aware of the costs which federal intervention will impose. Let me be clear that I am not advocating infringement of individual rights in the name of a cost-benefit analysis of ADEA application. What I am advocating is a workable and standard exemption for state and local law enforcement and firefighting personnel which will not compromise the basic purpose of the ADEA or the personnel affected.

It is very telling to note that those workers who would be affected by such an exemption are overwhelmingly in support of such legislation. This exemption has been endorsed by the National Trooper Coalition, the International Chiefs of Police, the International Association of Firefighters, the National Sheriffs

Association, the International Brotherhood of Police Officers, and many others. Those who would be most affected by such an exemption recognize it to be in both their best interest and in the best interest of public safety. This is a very narrow exception to only one element of the ADEA and the support of these groups indicates its need. It is not an open door to discrimination against these personnel -- if it were you can bet that these organization would not support it.

This approach has not only been endorsed by those employment organizations affected, but by numerous other organizations concerned with governmental services. These associations include the National Governors Association, the National Association of Attorneys General, the National League of Cities, and the National Association of Counties.

There is a compelling need to put this issue to rest in the least onerous, most protective way possible. An exemption from the maximum and minimum employment provisions of the Age Discrimination in Employment Act for state and local law enforcement and firefighting personnel provides such an answer. Such an exception is not a chipping away of the Act, and should not be coupled with any other changes. It is a very narrow and specific exemption which is supported by both the governments seeking it, and the personnel affected by it. Such an exemption would not establish a federally mandated hiring or retiring age, but would allow each of the states and localities to fashion a policy best suited to its needs. Each of area of this varied nation has unique needs and places different demands on its law enforcement and firefighting officers. Each governmental entity must be given the flexibility to set its hiring and retiring policy to meet that need. If a particular governmental entity decides that the demands on its personnel are such that they may work until age 80, so be it. But if the particular needs of another area require an age 55 retirement policy, that state or local government should be able to provide for the public safety of its citizens as it determines.

I appreciate the willingness of Chairman Nickles to address this issue and the opportunity to testify. I hope the Subcommittee on Labor will be able to move expeditiously on this matter.

Addendum TO:
Position Paper (A.D.E.A.)

APPENDIX A

Testimony of Senator Wendell H. Ford

Department of KENTUCKY STATE POLICE

PROJECTED

FISCAL AND SERVICE IMPACT

AGE 70 VS. AGE 55 RETIREMENT

FOR SWORN STATE POLICE OFFICERS

KENTUCKY STATE POLICE

MARCH, 1984

PROFESSIONAL STANDARDS DIVISION

I. FISCAL IMPACT

II. SERVICE IMPACT

III. GRAPHIC ILLUSTRATION

IV. RETIREMENT/EMPLOYMENT/PROMOTION

KENTUCKY STATE POLICE
FISCAL IMPACT PROJECTION
AGE 70 RETIREMENT VS. AGE 55

	COST TO RETAIN TO AGE 70	COST TO RETAIN TO AGE 55	ANNUAL SAVINGS AGE 55 RETIREMENT	CUMULATIVE SAVINGS
1985	$ 740,827	$ 287,355	$ 453,472	$ 453,472
1986	482,907	200,335	282,572	736,044
1987	633,701	266,346	367,355	1,103,399
1988	613,383	276,187	337,196	1,440,595
1989	571,830	274,957	296,873	1,737,468
1990	896,198	419,637	476,561	2,214,029
1991	767,774	381,971	385,803	2,599,832
1992	697,606	378,767	318,839	2,918,671
1993	986,178	507,515	478,663	3,397,334
1994	999,039	535,448	463,591	3,860,925
1995	1,170,042	633,263	536,779	4,397,704
1996	1,629,540	840,564	788,976	5,186,680
1997	1,097,225	684,701	412,524	5,599,204
1998	1,187,219	750,476	436,743	6.035,947
1999	1,231,790	804,841	426,949	6,462,896

These projections are based upon:

1. A sworn complement of 966 - Held constant;
2. Each vacated supervisory/command position being filled by promotion - with a 10% salary increase;
3. Each vacated Trooper/Detective position being filled by employing and training a Trooper - at beginning salary; and
4. The present State Police salary schedule - Held constant for the fifteen year period.

KENTUCKY STATE POLICE
SERVICE IMPACT BY
ADVANCING AGE OF OFFICERS

AGE GROUP	NUMBER OF OFFICERS	AVERAGE ACTIVITY PER TROOPER/DETECTIVE DURING 1983
21 - 31	289	1,525
32 - 44	531	1,053
45 - 55	145	742

NOTES: 1. Sample size used for averages:

50 Troopers age 21 - 31.
100 Troopers age 32 - 44.
53 Troopers age 45 - 55.

2. Productivity begins declining at about age 32.

3. Productivity declines at an increasing rate after about age 45.

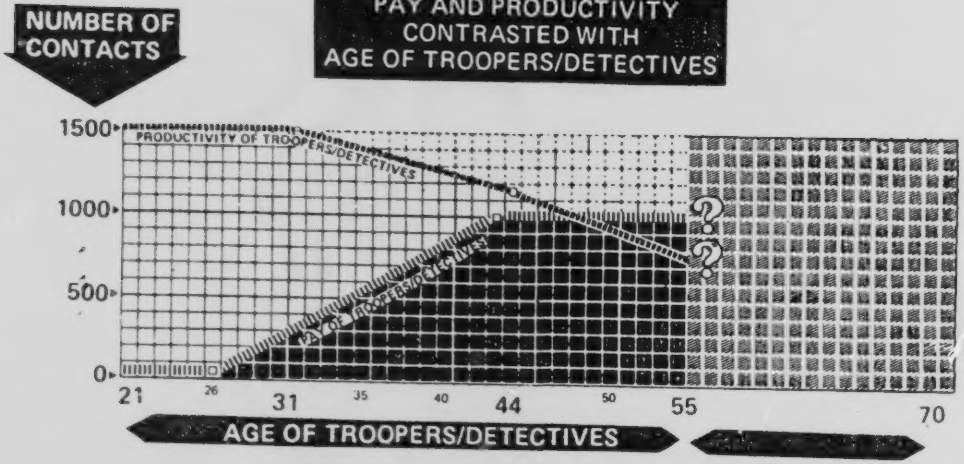
4. If officers were not retired at age 55 and if productivity declines at the same rate after age 55, it would be near zero by age 70.

KENTUCKY STATE POLICE

GRAPHIC ILLUSTRATION

MARCH 1984

PAY AND PRODUCTIVITY CONTRASTED WITH AGE OF TROOPERS/DETECTIVES



NOTE THAT:

1. Salary increases with tenure (age).
2. Productivity decreases with tenure after age 31.
3. Salary cost increases and reduced productivity are unknown beyond age 55.

AGE GROUP	NUMBER OF OFFICERS	AVERAGE ACTIVITY PER TROOPER PER YEAR
21-31	289	1,525
32-44	531	1,053
45-55	289	742

← CALANDER YEAR 1983 →

SAMPLE SIZE USED FOR AVERAGE

50 Troopers age 21-31
100 Troopers age 32-44
53 Troopers age 45-55

KENTUCKY STATE POLICE
RETIREMENTS/EMPLOYMENT/PROMOTIONS
1985 - 1999

SCHEDULED RETIREMENTS DURING NEXT 15 YEARS

159 - Troopers/Detectives
60 - Sergeants)
28 - Lieutenants)
18 - Captains) 117 Supervisor/Command
6 - Majors)
5 - Colonels (4 Lt. Cols. & Comr.)

SCHEDULED EMPLOYMENT (REPLACEMENTS)

276 - Troopers/Detectives

POSSIBLE PROMOTIONS (REPLACEMENTS)

60 Sergeants = 60 Promotions Possible
28 Lieutenants = 56 Promotions Possible
18 Captains = 54 Promotions Possible
6 Majors = 24 Promotions Possible
5 Colonels = 25 Promotions Possible
TOTAL 219 Promotions Possible

Abolishment of the mandatory age 55 retirement law would:

1. Decrease by 276 the number of employment opportunities and by 219 the possible number of promotional opportunities for which minorities and females could compete;
2. Decrease the inflow and upward mobility of younger more energetic officers which a viable police agency requires; and
3. Decrease overall production (see II and III) to an unacceptable level.

Senator **Nickles**. Thank you very much, Senator Ford.

Senator Bradley, we welcome you before the committee. We note that you have introduced S. 698, along with Senator Abdnor, which is similar to or identical to H.R. 1435. We appreciate your interest in this legislation as well.

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Bradley**. Thank you very much, Mr. Chairman. It is a pleasure to appear before you and to appear with Senator Ford on this issue.

Mr. Chairman, I commend you for calling this hearing regarding retirement policies for firefighters, law enforcement officers, and other employees whose job performance affects the public's health and safety. I have had a longstanding interest in whether State and local governments should be permitted to set their own retirement policies for these employees.

Last year, I introduced S. 698, legislation that amends the Age Discrimination in Employment Act to allow States and municipalities the flexibility to determine entry and retirement ages for their public safety officers and firefighters.

Mr. Chairman, Congress has already exempted from ADEA certain classes of Federal Government workers who regularly face unique mental and physical handicaps. Since 1974, Federal firefighters and law enforcement officers, including members of the FBI, the Secret Service, and Federal prisons, must retire at age 55.

This bill extends the exemption to allow States and municipalities to determine retirement and entry ages for their own public safety officers and firefighters, just as Congress has done for similarly situated Federal employees.

This issue is coming to a head at this time because the Supreme Court recently held in EEOC versus Wyoming that the Age Discrimination in Employment Act covers States and political subdivisions. A major consequence of this decision was to invalidate the laws of States and local governments which set retirement ages of less than 70 for public safety officers and firefighters. Needless to say, the Supreme Court decision has caused disarray in the affected State and local jurisdictions.

This issue was brought to my attention last year by the Governor of New Jersey and the head of the New Jersey State Police, Col. Clinton L. Pagano. I am pleased to say that Colonel Pagano will be testifying before the committee today, I understand.

They have asked for this legislative remedy. In addition, the National Governors Association, the National Association of Attorneys General, the International Association of Chiefs of Police, the National Troopers Coalition, and numerous other law enforcement organizations have passed resolutions calling on Congress to exempt certain public safety officers from ADEA.

Mr. Chairman, I am a strong proponent of the Age Discrimination in Employment Act. This bill should not be construed as an invitation to start chipping away at those protections. But older Americans have as much reason as anyone to insure that those who must perform emergency services are physically able to do so.

Congress has already determined that age is a significant factor in job performance for a very select group of occupations to be exempted under this bill; it merely offers State and local governments the option to exempt these same occupations regardless of whether the person works for the Federal Government or a State or local government.

One final point, Mr. Chairman. I realize, as in most legislative issues, that there are two sides to this one and I hope that these hearings are helpful in airing all concerns on the matter. We need to hear from all affected parties in order to develop appropriate legislative remedies, and I look forward to working with you and the members of your committee and the Senate, Senator Ford in particular, in resolving this issue.

Senator NICKLES. Senator Bradley, thank you very much. I have a quick question or two.

Senator Ford, I will ask you the first one. You were Governor of Kentucky and had the responsibility of the highway patrol and the various State law enforcement personnel. Also I compliment you on your statement. That is a very detailed 14-page statement with supplements included on the Kentucky State Police, et cetera.

There will be some that might state today that this is an attack on the Age Discrimination in Employment Act. Some will say we should broaden the act instead of making exclusions for law enforcement personnel. Do you think their comments are valid or that this legislation is an attempt to get around ADEA for most employees?

Senator FORD. Mr. Chairman, I do not think the goals of ADEA and the legislation which has been introduced are conflicting or mutually exclusive. There is a narrow exception here, a very narrow exception that does not open the Act up for further exceptions.

Exempting these personnel who are responsible for public safety does not represent a backward slide, if I can use that term, in ADEA coverage. From a public policy point of view it is inconsistent to exempt certain Federal law enforcement and firefighting personnel while denying the same flexibility to State and local governments. Insuring public safety is an equally important goal, and exempting these workers and enabling State and localities to meet their responsibilities to provide for health and safety of all of our citizens—allows those governments to accomplish their goal.

Mr. Chairman, you mentioned that I was Governor and I had an opportunity to work closely with the State police. What I am going to do here probably will be just picking out two or three things that come to mind, but the FBI and other people were following some fugitives who had hostages down I-75 and we were asked to stop them in Kentucky, not let them go any further.

Fortunately, we did so without any injury to the fugitives, hostages or our State police personnel. I was in southcentral Kentucky when one of our troopers—and, by the way, we are a rural State, with 120 counties. We have a little over 900 State troopers who are the supplement for the county law enforcement, and they are well respected. The only backup these troopers might have, Mr. Chairman, would be 20 to 30 minutes away in case of an emergency.

But I was near Scottsville, KY when a trooper was almost fatally wounded and a very good friend of mine was the physician who performed surgery on this trooper and he told me that if he had been an older person he would not have survived the injury.

While I was Governor, Mrs. Ford's security State police, after we left the Governor's office, was shot three times with a .57 Magnum, and you talk about the hard time of surviving that one, but the University Medical Center told me as I visited with him that had he been an older person he would not have survived.

Mr. Chairman, I have never dealt with a finer group of men than the Kentucky State Police. They give it all, and at some point they have a burnout, both physically and mentally. Public safety and health here is determined in split seconds, split seconds, and it is important that State and local governments are allowed I think to make a determination about the age, the ability and retirement of those who protect their citizens.

This proposal does not cost the Federal Government any money. I am sure we are going to hear a lot of stories today about how people are qualified, physically able at an older age. I respect the age of the President of the United States, but he does not run around in an automobile traveling 120 miles an hour, and he may be able to be a quick-draw, but it would be a little difficult for him to do what I think a 40-year-old State trooper or a 35-year-old State trooper or a 50-year-old State trooper would have to do.

Senator **Nickles**. I appreciate your comments. Are there not exclusions to ADEA for Secret Service or FBI?

Senator **Bradley**. Mr. Chairman, there are exclusions for Federal public safety officers—firefighters, law enforcement officials, the FBI, the Secret Service, Federal prisons—all those are exceptions, and the purpose of the legislation is that the limited exemption that is now under the law, the so-called bona fide occupation qualification, could I believe be clearly met. But that means that every jurisdiction, every local goverment, every State would have to come into the process, get the exemption and test it in the courts. This is a recipe I think for endless delay. If it is a clear-cut case, I think we ought to pass this Federal law and simply exempt the local and State jurisdictions from the application of the act.

It is clearly consistent with what we do at the Federal level. Later today, when Col. Pagano of the New Jersey State Police testifies, he will give you chapter and verse and almost as vivid a description as Senator Ford has as to the importance of having people on duty who can react in split seconds, as Senator Ford talked about.

I might also say for the record that in New Jersey there has been a State law passed that requires mandatory retirement at 55 that was challenged in the courts by the EEOC. A Federal judge denied the preliminary injunction and the trial on the merits has begun and my guess is that—well, we will wait and see how it turns out, but the judge's statements in denying a preliminary injunction indicate her view that there may be need for an exemption.

Senator **Nickles**. But that is still in court?

Senator **Bradley**. That is still in court.

Senator **Nickles**. Is that in district court?

Senator **Bradley**. Yes, it is.

Senator **Nickles**. In New Jersey?

Senator **Bradley**. Yes, it is.

Senator **Nickles**. The EEOC is contesting an age of 55.

Senator **Bradley**. Yes, they are contesting it and they asked for a preliminary injunction and she denied the preliminary injunction and said that the State police would very possibly succeed during the future trial on the merits. She also said the EEOC's clients would not be irreparably harmed as a result of the injunction not being issued, so she did not issue the injunction and the trial is now in the process of beginning.

Senator **Nickles**. To both of our panelists, we appreciate your leadership in this area and we look forward to working with you.

Senator **Ford**. Mr. Chairman, just in closing I might say for the record—and I am sure most know it—that there are 32 States that are affected by this, and I think it clearly tells us that a majority of the States feel this is the best procedure. We have to remember that these people are on what we call a firing-line job that is both hazardous and demanding and I would hope that we could find a procedure where the States could be allowed to make their own judgment here. I think it is in the best interest of everyone's safety and I compliment Senator Bradley for his statement this morning and the hard work he is doing. I think we both understand, and I am sure you do, the problems that are faced by the various States.

Senator **Nickles**. Your legislation is quite similar, and Senator Quayle has introduced legislation which is slightly different.

Senator **Ford**. I think we all will probably join together to work up a bill and I am beginning to believe that Senator Bradley probably has a better bill than I do, but I would like to have a chance to—have some input into a final bill.

Senator **Nickles**. We will get together with you and see if we cannot come up with something.

Senator **Bradley**. Mr. Chairman, I look forward to the passage of the Ford-Nickles-Bradley bill.

Senator **Nickles**. Thank you very much, Senator Bradley.

Thank you, Senator Ford.

Our next panelist is William Ng, deputy general counsel of the EEOC. Mr. Ng, welcome to the committee. We appreciate your input on this legislation.

STATEMENT OF WILLIAM H. NG, DEPUTY GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY KENNETH MORSE, SENIOR TRIAL ATTORNEY, EEOC

Mr. **Ng**. Good morning, Mr. Chairman. We are pleased to be here My name is William Ng, and I am deputy general counsel of the Equal Employment Opportunity Commission. With me is Mr. Ken Morse, one of our senior trial attorneys who has been coordinating the Commission's litigation in the area of age discrimination insofar as it affects public safety workers.

The chairman of our agency, the Honorable Clarence Thomas, has submitted a statement for the record and we ask that it be accepted by the committee.

Senator **Nickles**. Certainly.

[The prepared statement of Mr. Thomas follows:]

STATEMENT FOR THE RECORD BY CLARENCE THOMAS, CHAIRMAN U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION BEFORE THE SENATE SUBCOMMITTEE ON LABOR HEARING ON RETIREMENT POLICIES FOR FIREFIGHTERS, LAW ENFORCEMENT OFFICERS AND OTHER EMPLOYEES WHOSE JOB PERFORMANCES AFFECTS THE PUBLIC HEALTH AND SAFETY

MARCH 18, 1986

AT THE OUTSET, LET ME SAY THAT THIS STATEMENT HAS NOT BEEN COORDINATED WITHIN THE EXECUTIVE BRANCH, AND IT, THEREFORE, DOES NOT REPRESENT AN ADMINISTRATION POSITION.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS BEEN CONSISTENT IN ITS POSITION CONCERNING RETIREMENT POLICIES FOR PUBLIC SAFETY OFFICERS. THAT IS, AGE SHOULD NOT BE UTILIZED AS THE PRIMARY DETERMINANT OF AN INDIVIDUAL'S ABILITY TO PERFORM EFFECTIVELY IN A POSITION, AND THUS, AS THE SOLE FACTOR UPON WHICH MANDATORY RETIREMENT OR TERMINATION IS PREDICATED.

IT IS THE GOAL OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") TO "PROMOTE THE EMPLOYMENT OF OLDER PERSONS BASED ON THEIR ABILITY RATHER THAN AGE."[1] MAXIMUM HIRING AND MANDATORY RETIREMENT AGE LIMITS WHICH DO NOT TREAT PEOPLE ON AN INDIVIDUAL BASIS ARE IN DIRECT CONFLICT WITH THIS GOAL. EVEN IF IT COULD BE SHOWN THAT AGE LIMITATIONS FURTHER THE GOAL OF A FIT PUBLIC SAFETY DEPARTMENT, STATE AND LOCAL GOVERNMENTS HAVE AN OBLIGATION TO USE THE LEAST DISCRIMINATORY MEANS AVAILABLE TO FURTHER THAT GOAL.[2]

THE GOAL OF PHYSICALLY FIT PUBLIC SAFETY DEPARTMENTS CAN BE ACHIEVED THROUGH NON-DISCRIMINATORY MEANS

THE ADEA DOES NOT INTERFERE WITH A STATE OR LOCAL GOVERNMENT'S ABILITY TO PRESCRIBE REASONABLE QUALIFICATIONS FOR PUBLIC SAFETY OFFICERS OR TO DISCHARGE THOSE INDIVIDUALS UNFIT TO PERFORM ADEQUATELY.[3] SECTION 4(f)(1) OF THE ACT SPECIFICALLY PROVIDES THAT "IT SHALL NOT BE UNLAWFUL FOR AN EMPLOYER...TO TAKE ANY ACTION OTHERWISE PROHIBITED...WHERE AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION REASONABLY NECESSARY TO THE NORMAL OPERATION OF A PARTICULAR BUSINESS..."

IF A HIRING OR MANDATORY RETIREMENT AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION, THE STATE OR LOCAL GOVERNMENT CAN IMPOSE THAT AGE LIMIT. MERELY REQUIRING STATE AND LOCAL GOVERNMENTS TO CONSIDER THE FACTS RELEVANT TO SUCH A DECISION DOES NOT IMPAIR THEIR ABILITY TO FUNCTION.[4] WHAT THE ACT FORBIDS IS ARBITRARY AGE DISTINCTIONS BASED ON STEREOTYPED ASSUMPTIONS RATHER THAN ANALYSIS OR DETERMINATIONS BASED ON INDIVIDUAL MERIT.[5]

MANDATORY RETIREMENT AGE CEILINGS ARE NOT REQUIRED TO ENSURE A FIT WORKFORCE

IN 1980, THE COMMISSION CAREFULLY EXAMINED WHETHER STATE AND LOCAL GOVERNMENTS SHOULD BE ALLOWED TO SET MAXIMUM HIRING AND MANDATORY RETIREMENT AGE LIMITS FOR POLICE AND FIREFIGHTING PERSONNEL. IN CONDUCTING THIS ANALYSIS, THE COMMISSION CONSULTED WITH MEDICAL EXPERTS AS WELL AS OTHER PROFESSIONALS WHO HAD STUDIED THE DUTIES OF PUBLIC SAFETY OFFICERS. THE COMMISSION'S RESEARCH SUPPORTED THE CONCLUSION THAT AN INDIVIDUAL ASSESSMENT OF FITNESS IS A MORE EFFECTIVE, LESS DISCRIMINATORY MEANS OF ENSURING A FIT WORKFORCE. (COPY OF MEMORANDUM IS ATTACHED.)

MANY OF THE POLICE AND FIRE DEPARTMENTS THE EEOC HAS INVESTIGATED FOR ADEA VIOLATIONS, ASSERT THAT MAXIMUM HIRING AND MANDATORY RETIREMENT AGE LIMITATIONS ARE NECESSARY BECAUSE OLDER APPLICANTS AND OLDER EMPLOYEES ARE NOT FIT TO PERFORM THEIR JOBS. THE MAJORITY OF THESE DEPARTMENTS, HOWEVER, DO NOT KNOW THE LEVEL OF FITNESS OF THEIR OFFICERS SINCE THEY HAVE NO PERIODIC FITNESS TESTS OR MEDICAL SCREENING. AS A NUMBER OF FEDERAL COURTS HAVE NOTED, THE FAILURE TO TEST FOR FITNESS DEMONSTRATES A LACK OF CONCERN FOR FITNESS. MANY OF THE DE-

PARTMENTS THAT THE COMMISSION HAS INVESTIGATED ALLOWED EMPLOYEES THAT WERE KNOWN TO BE UNFIT TO CONTINUE TO WORK. THEREFORE, THE UTILIZATION OF AGE AS A MEASURE OF FITNESS IS SIMPLY AN ARBITRARY MEANS OF TERMINATING OR RETIRING OLDER EMPLOYEES.

THE EXPERIENCE OF NUMEROUS PUBLIC SAFETY DEPARTMENTS HAS DEMONSTRATED THAT MAXIMUM HIRING AGES OR MANDATORY RETIREMENT AGES ARE NOT REQUIRED TO ENSURE A FIT WORKFORCE.

PHYSICAL FITNESS TESTING AND TRAINING PROGRAMS HAVE BEEN USED BY PUBLIC SAFETY DEPARTMENTS FOR MANY YEARS AS AN EFFECTIVE MEANS FOR ACHIEVING A PHYSICALLY FIT WORKFORCE. AT LEAST 18 STATES HAVE PHYSICAL FITNESS/HEALTH PROGRAMS FOR STATE LAW ENFORCEMENT OFFICERS.[6] AT LEAST 10 MAJOR CITIES HAVE PHYSICAL FITNESS TESTING AND/OR TRAINING PROGRAMS. RESEARCH ON THE CITY OF LOS ANGELES' FIRE DEPARTMENTS PHYSICAL FITNESS TESTING AND TRAINING PROGRAM HAS SHOWN THAT:

1. THE DEPARTMENT HAS MAINTAINED ITS PHYSICAL FITNESS TESTING AND TRAINING PROGRAM SINCE 1971.

2. THROUGH ITS PHYSICAL FITNESS PROGRAM, THE DEPARTMENT HAS INCREASED ITS FITNESS LEVEL, REDUCED RISK FACTORS ASSOCIATED WITH HEART DISEASE AND REDUCED INJURIES OCCURRING ON THE JOB.

3. THE DEPARTMENT CAN ECONOMICALLY TEST ITS EMPLOYEES TO DETERMINE THEIR FITNESS TO PERFORM THE DUTIES OF THEIR JOB.

4. FIREFIGHTERS IN THEIR 60s CAN AND DO REGULARLY PASS THE FITNESS TESTS ESTABLISHED FOR FRONT-LINE FIREFIGHTERS.[7]

5. A 1985 REPORT OF THE LOS ANGELES FIRE DEPARTMENT'S FITNESS PROGRAM REVEALS THAT ITS FITNESS PROGRAM HAS DRAMATICALLY INCREASED THE PHYSICAL WORK CAPACITY OF ITS FIREFIGHTERS, PARTICULARLY THOSE OVER 50 YEARS OF AGE. AS A RESULT OF THE PROGRAM, THE DEPARTMENT EXPERIENCED A 25% DECREASE IN WORKERS' COMPENSATION CLAIMS. THE REPORT ALSO INDICATES THAT THE INCIDENCE OF HEART ATTACKS HAS BEEN REDUCED BY 50% AS A RESULT OF THE PROGRAM AND THAT THERE HAVE BEEN NO CARDIOVASCULAR DEATHS WHILE FIGHTING FIRES. (A COPY IS ATTACHED.)

THE EXPERIENCE OF THE LOS ANGELES FIRE DEPARTMENT WITH THEIR PHYSICAL FITNESS PROGRAM HAS BEEN CONFIRMED BY OTHER LAW ENFORCEMENT AND FIRE DEPARTMENTS' EXPERIENCES. PHYSICAL FITNESS TESTING AND TRAINING ARE THE APPROPRIATE MEANS FOR ACHIEVING THE GOAL OF A FIT PUBLIC SAFETY DEPARTMENT, RATHER THAN ARBITRARY AND DISCRIMINATORY AGE RESTRICTIONS.

PERFORMANCE DOES NOT DECLINE WITH AGE

JOB PERFORMANCE DOES NOT INEVITABLY DECLINE WITH AGE. A 1977 SENATE SPECIAL COMMITTEE ON AGING WORKING PAPER STATED:

> CHRONOLOGICAL AGE ALONE IS A POOR INDICATOR OF ABILITY TO PERFORM ON THE JOB. MANDATORY RETIREMENT AT A FIXED AGE DOES NOT TAKE INTO ACCOUNT A WORKER'S ABILITIES AND CAPABILITIES, WHICH VARY SHARPLY FROM INDIVIDUAL TO INDIVIDUAL.[8]

RESEARCH ON THE PERFORMANCE OF OLDER WORKERS HAS SHOWN THAT THEY OFTEN PERFORM AS WELL AS OR BETTER THAN YOUNGER WORKERS AND HAVE FEWER ON-THE-JOB ACCIDENTS.[9]

AGE HAS ALSO BEEN SHOWN TO BE A POOR PREDICTOR OF ABILITY TO PERFORM THE DUTIES OF A LAW ENFORCEMENT OFFICER OR FIREFIGFHTER. THE ISSUE OF THE RELATIONSHIP BETWEEN AGE AND PERFORMANCE OF PUBLIC SAFETY OFFICERS HAS BEEN STUDIED.

RESEARCH BY EXERCISE PHYSIOLOGISTS, CONCLUDED THAT AGE DOES NOT DETERMINE WHO CAN SAFELY AND EFFECTIVELY PERFORM THE DUTIES OF A LAW ENFORCEMENT OFFICER OR FIREFIGHTER. FURTHER, RESEARCH CONDUCTED BY PROFESSORS SILVER AND FLYNN[10] HAS REVEALED THAT THE ABSENCE OF HIRING AGE LIMITS FOR LAW ENFORCEMENT OFFICERS HAS NO BEARING ON THE FUTURE SUCCESS OF APPLICANTS. THE JUDGMENT, SKILL AND KNOWLEDGE THAT COMES WITH EXPERIENCE HAS BEEN A DEFINITE ASSET OF OLDER LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS.[11]

RESEARCH HAS ALSO DISCLOSED THAT THE PERFORMANCE OF MOST PUBLIC SAFETY WORK IS NOT GENERALLY ARDUOUS OR HAZARDOUS. THE STUDY DONE BY PROFESSORS SILVER AND FLYNN NOTED THAT POLICE WORK IS PRIMARILY A SERVICE OCCUPATION WHICH HAS ONLY AN OCCASIONAL DANGEROUS EVENT. A STUDY OF SUBURBAN MINNEAPOLIS POLICE DEPARTMENTS DEMONSTATED THAT THE SKILLS OF OBSERVATION, ANALYSIS OF INFORMATION, DECISION-MAKING, AND ORAL AND WRITTEN COMMUNICATION WERE CRITICAL TO SUCCESSFUL LAW ENFORCEMENT WORK.[12]

THIS SAME STUDY FOUND THAT THERE WAS ONLY A SLIGHT DEMAND FOR PHYSICAL ACTIVITY.

BASED ON THE RESEARCH DONE ON THE PERFORMANCE OF OLDER POLICE OFFICERS AND FIREFIGHTERS, THERE IS NO EVIDENCE WHICH LEADS TO THE CONCLUSION THAT PHYSICALLY FIT OLDER PUBLIC SAFETY OFFICERS CANNOT PERFORM THEIR JOBS SAFELY AND EFFECTIVELY. THIS CONCLUSION IS STRONGLY SUPPORTED BY THE HOUSE SELECT COMMITEE ON AGING'S REPORT ENTITLED "THE MYTHS AND REALITIES OF AGE LIMITS FOR LAW ENFORCEMENT AND FIREFIGHTING PERSONNEL," COMM. PRINT NO. 98-468.

SUPREME COURT HOLDINGS SUPPORT THE COMMISSION'S LITIGATION POSTURE

THE COMMISSION'S ENFORCEMENT OF THE ADEA IS AN ESSENTIAL PART OF ITS CONGRESSIONAL MANDATE. THIS ENFORCEMENT EFFORT HAS INCLUDED THE LITIGATION OF A SIGNIFICANT NUMBER OF CASES CHALLENGING THE ARBITRARY MAXIMUM HIRING AGE AND MANDATORY RETIREMENT PRACTICES OF STATE AND LOCAL POLICE AND FIRE DEPARTMENTS.

TWO RECENT SUPREME COURT DECISIONS SUPPORT THE COMMISSION'S ADEA ENFORCEMENT EFFORTS. IN JOHNSON v. MAYOR AND CITY COUNCIL OF BALTIMORE, 105 S.CT. 2717 (1985), THE COURT HELD THAT A FEDERAL

STATUTE REQUIRING FEDERAL FIREFIGHTERS TO RETIRE AT AGE 55 DID NOT ESTABLISH AS A MATTER OF LAW THAT AGE 55 IS A BFOQ FOR NON-FEDERAL FIREFIGHTERS. IN ITS DECISION, THE COURT SPECIFICALLY REJECTED THE NOTION THAT MANDATORY AGE-BASED RETIREMENT COULD BE IMPOSED AS A BFOQ WITHOUT A PARTICULARIZED FACTUAL SHOWING.

IN ADDITION, IN WESTERN AIR LINES v. CRISWELL, 105 S.CT. 2743 (1985), THE SUPREME COURT REITERATED THAT THE BFOQ DEFENSE UNDER SECTION 4(f)(1) OF THE ADEA WAS INTENDED TO BE "AN EXTREMELY NARROW EXCEPTION TO THE GENERAL PROHIBITION OF AGE DISCRIMINATION." THE COURT EXPRESSLY ADOPTED THE TWO-PART-TEST FOR EVALUATION OF A BFOQ DEFENSE WHICH IS FOLLOWED IN THE COMMISSION'S REGULATIONS. (SEE 29 CFR 1625.6 (b) (1984). THE COURT NOTED THAT THE LANGUAGE AND THE HISTORY OF THE ADEA SUPPORTS THE CONCEPT OF AN INDIVIDUALIZED ASSESSMENT OF EMPLOYEE FITNESS.

THE CONTINUED APPLICATION OF THE ADEA TO STATE AND LOCAL GOVERNMENTS MAY RESULT IN COST SAVINGS

THE PROPONENTS OF ADOPTING AGE LIMITS AT WHICH PUBLIC SAFETY OFFICERS ARE MANDATORILY RETIRED HAVE ARGUED THAT PROHIBITING STATE AND LOCAL

GOVERNMENTS FROM SETTING SUCH LIMITS WOULD BE FINANCIALLY BURDENSOME FOR PUBLIC SAFETY DEPARTMENTS. THIS ARGUMENT WAS RAISED IN EEOC v. WYOMING, 103 S. CT. 1054 (1983), AND REJECTED BY THE SUPREME COURT WHICH OPINED:

> IN THIS CASE, WE CANNOT CONCLUDE FROM THE NATURE OF THE ADEA THAT IT WILL HAVE EITHER A DIRECT OR AN OBVIOUS NEGATIVE EFFECT ON STATE FINANCES. OLDER WORKERS WITH SENIORITY MAY TEND TO GET PAID MORE THAN YOUNGER WORKERS WITHOUT SENIORITY AND MAY BY THEIR CONTINUED EMPLOYMENT ACCRUE INCREASED BENEFITS WHEN THEY DO RETIRE. BUT THESE INCREASED COSTS, EVEN IF THEY WERE NOT LARGELY SPECULATIVE IN THEIR OWN RIGHT, MAY VERY WELL BE OUTWEIGHED BY A NUMBER OF OTHER FACTORS: THOSE SAME OLDER WORKERS, AS LONG AS THEY REMAIN EMPLOYED, WILL NOT HAVE TO BE PAID ANY PENSION BENEFITS AT ALL, AND WILL CONTINUE TO CONTRIBUTE TO THE PENSION FUND. AND, WHEN THEY DO RETIRE, THEY WILL LIKELY, AS AN ACTUARIAL MATTER, RECEIVE BENEFITS FOR FEWER YEARS THAN WORKERS WHO RETIRE EARLY.[13]

THE INDIVIDUAL COSTS RESULTING FROM ALLOWING STATE AND LOCAL GOVERNMENTS TO MANDATORILY RETIRE PUBLIC SAFETY OFFICERS WILL BE SUBSTANTIAL. MANDATORY RETIREMENT OFTEN RESULTS IN A LOSS OF SKILL, SOCIAL STATUS AND SELF-RESPECT. THE AMERICAN MEDICAL ASSOCIATION HAS OPPOSED COMPULSORY RETIREMENT ON THE GROUNDS THAT IT MAY IMPAIR THE EMOTIONAL AND PHYSICAL HEALTH OF AN INDIVIDUAL.[15] THERE IS NO REASON TO BELIEVE THAT THE ADVERSE EFFECT OF MANDATORY RETIREMENT WILL BE ANY LESS FOR PUBLIC SAFETY OFFICERS THAN IT WOULD BE FOR OTHER CITIZENS.

CONCLUSION

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION BELIEVES THAT AGE SHOULD NOT BE UTILIZED AS THE PRIMARY DETERMINANT OF AN INDIVIDUAL'S ABILITY TO PERFORM EFFECTIVELY AS A PUBLIC SAFETY OFFICER, AND THUS, AS THE SOLE FACTOR UPON WHICH MANDATORY RETIREMENT OR TERMINATION IS PREDICATED.[16] THIS POSITION IS SUPPORTED BY BOTH RESEARCH AND THE COURTS. THE COMMISSION WILL CONTINUE TO DEVOTE SUBSTANTIAL RESOURSES TO ITS VIGOROUS ENFORCEMENT OF THIS PORTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

FOOTNOTES

1. Section 2(b), 29 U.S.C. §621(b).
2. *See* 29 C.F.R. §1625.6(b). This limitation is similar to the standard a public safety employer would have to meet under Title VII of the Civil Rights Act of 1964 if it had a policy or practice that had an adverse impact on women or minorities.
3. 460 U.S. 226 (1983)
4. *Id*. at 239
5. *Id*.
6. Professor Kenneth Christian, State Policy/Highway Patrol Agencies in the United States: Survey of Selected Personnel Practices, 1983 (Unpublished survey conducted for the commission).
7. James Barnard, PH.D. and Donald F. Anthony, Effect of Health Maintenance Programs on Los Angeles City Firefighters, *Journal of Occupational Medicine*, Vol. 22, No. 10, October, 1980 at 667-669; and, Good Health Through Physical Fitness, Los Angeles City Fire Department, 1971.
8. Senate Special Committee on Aging, The Next Steps in Combating Age Discrimination in Employment: With Special Reference to Mandatory Retirement Policy, 95th Cong. 1st Sess., 20 (Comm. Print 1977), Legislative History 279, 300.
9. Improving the Age Discrimination Law, A working Paper prepared for the Senate Special Committee on Aging, United States Senate, 93rd Congress, 1st Sess. (1973), p. 15.
10. Professors Isadore Silver and Edith Flynn, Police Selection Maximum Standards (1980) (Unpublished Study Conducted for the Commission).
11. See, *Aaron v. Davis*, 414 F. Supp. 453, 459 (Ed. Ark. 1976).

12. Metropolitan Area Management Association and the Metropolitan Council, Selecting Police Officers, 12 (1980).

13. Supra, note 3 at 241.

14. Robert Butler, Why Survive? Being Old in America, pp. 72-74 (Harper & Row, 1975).

15. American Medical Association Committee on Aging, Retirement: A Medical Philosophy and Approach at 2 (undated).

16. The findings of the Equal Employment Opportunity Commission which form the bases for our views on this legislation are strongly supported by a report by the Chairman of the House Select Committee on Aging Report titled, "The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel," 98th Cong. 2d Sessl, IV (Comm. Print 1984).

(EDITOR'S NOTE: Due to printing limitations and in the interest of economy, additional material accompanying Mr. Thomas' statement was retained in the files of the committee.)

Mr. NG. At this point, we would just briefly summarize the highlights of that statement and provide a bit of short background on the nature of our agency.

The EEOC acquired jurisdiction in this area in 1979, pursuant to President Carter's reorganization plan which transferred enforcement of the Age Discrimination In Employment Act from the Department of Labor to the Equal Employment Opportunity Commission, which at that time enforced title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, national origin and sex. In 1979 we acquired jurisdiction over ADEA as well.

Our enforcement program, Mr. Chairman, in the age area is based simply on the language of the statute. Under the statute, under the ADEA, there are two general principles. Principle one is simply that it shall be an unlawful employment practice to refuse to hire or discharge persons on the basis of age. The second principle is simply that it shall be an unlawful employment practice to classify individuals and treat them as part of a group based on age.

There is one narrow exception, relevant to our discussion, which is known as the bona fide occupational qualification exception. This exception simply provides that an employer may classify individuals on the basis of age or refuse to employ persons on the basis of age if it can be proven that age is a bona fide occupational qualification. This simply means that use of an age limitation is reasonably necessary to perform the job at stake, and that all individuals beyond a particular age substantially all lack the qualifications necessary to perform that job.

The resolution of these matters pursuant to the statute or pursuant to our general enforcement process is simple. Under our statute, we are provided with essentially three governmental powers. The first power is the power to investigate, that is to find facts and evidence. The second power is a direction—it is not really a power—but it is the direction by statute to attempt to resolve problems by voluntary compliance, that is by negotiation, by discussion, by settlement. And the third authority is simply the authority to bring a suit in Federal court and allow a neutral fact-finder, a Federal court subject to appeal, to decide the issue, and we acknowledge that in the BFOQ area—we generally refer these public safety cases as BFOQ cases—are factual cases and that means that individuals, entities, the EEOC and employers may in fact disagree on the facts.

We have had success in resolving cases by settlement, by bilateral negotiations, and we have also had successes in litigation. Litigation, of course, means that we subject our evidence to testing by a neutral fact-finder who may or may not agree with our position. I think at this point our record in this area is about 50/50.

At this point we would be happy to answer any questions the committee may have. As I said, I have brought Mr. Morse with me who is intimately acquainted with the current status of our litigation and the various issues that have come up and we would be happy to answer any questions.

Senator NICKLES. Thank you very much, Mr. Ng. I have not read all the statement that was submitted by yourself and Mr. Thomas. I will review it. Did you take a position on the legislation introduced by Senator Ford or Senator Bradley?

Mr. NG. Mr. Chairman, we were told, I was told that the nature of EEOC's comments, the basic question that was asked was in the nature of oversight, that is background information. We were not asked to comment specifically on legislation. Frankly, if we had been asked to do so, we would not have been able to do so because the Commission as a body has not considered the legislation and, of course, comments on legislation also have to be referred through the intergovernmental review process and the coordination process.

Senator NICKLES. So you really have not taken a position on the legislation as such?

Mr. NG. No, sir, not at this time.

Senator NICKLES. It was mentioned that 35 States have some restrictions or retirement ages earlier than age 70 for various hazardous occupations. Does that sound correct to you?

Mr. NG. I am going to refer that question to my expert, Mr. Morse.

Mr. MORSE. I think that there are approximately 35 States that have mandatory retirement ages for State law enforcement officers. My understanding is that there are not as many States with legislation requiring mandatory retirement for other positions that have been suggested as being public safety functions, such as prison or any types of State staff or local firefighters. I think that figure applies, to the best of my understanding, to State law enforcement officers such as State police.

Senator Nickles. Does that mean that 15 States would continue employing highway patrol or their State drug enforcement individuals up to age 70?

Mr. Morse. Up to age 70 and beyond, and I think that is a significant point, because we are not in a situation where there is any kind of uniformity among the States as to an appropriate retirement age. My understanding is that there are only 9 States that have selected age 55 as a mandatory retirement age for law enforcement officers. There are I believe fifteen States that have no mandatory retirement age or an age of 70, and there has been no evidence that has been submitted to date that I am aware of that any of the States that have chosen to not have mandatory retirement ages have had any problems in protecting the public safety, and I think that is a significant point because the suggestion has been made in litigation that if you eliminate mandatory retirement ages you will have health related problems, that officers or firefighters will not be able to protect the public safety.

But I think one problem with that suggestion is that the focus is wrong. In our litigation we have taken the position consistently that if individuals are unfit to perform the duties of their job they should not be allowed to continue to work, if that is the decision of the State.

If you have a firefighter who is 65 and who is unfit, the ADEA provides a defense to a charge of discrimination and retiring that individual.

Mr. Nickles. Mr. Morse, on that type of a presumption, would you not be putting a great burden on that State or city to provide additional health screening tests? Senator Ford mentioned a person who was shot. Had this person been in his sixties, his likelihood of survival would have been substantially less.

Mr. Morse. I think the cost issue is an important point. Some of the data that we have seen indicates that if, instead of using an age base criteria to insure fitness, you actually assess fitness on an individualized basis, which has been our commission's position in litigation, that in fact you will have a safer work force than use of mandatory retirement ages.

Senator Nickles. Don't many States and municipalities structure their retirement systems to make them generous to the point of rewarding an individual for being in a very hazardous-type occupation, and also with the idea of knowing or structuring those to where this individual would have completed his service in 20 or 30 years; in other words they have a more generous-type system than one that might be employed for State office workers?

Mr. Morse. I would think that, for example, in the Federal area where they have chosen age 55, they have a maximum hiring age of 35 so people can work 20 years, prior to retirement. There also is a tendency among the States to tie mandatory retirement ages to full pension benefits.

Senator Nickles. Do you think that is wrong?

Mr Morse. I think it is a logical connection, but I do think if they were to have a normal retirement age where people could leave voluntarily, that that would not be a problem. In the cases we have litigated, there has not been a justification for making the particular ages selected mandatory retirement ages.

Senator **Nickles**. Because of the hazardous-type occupation, would you not be imposing a tremendous additional financial burden if you required them to be allowed to stay beyond age 55, say to age 70 or longer? Age 70 is capped with ADEA right now and it may be lifted at some time. Wouldn't that be quite a financial burden on those States and cities as well because they were structured with the targeted date of age 55? Say their targeted goal was 70 percent of salary or 50 percent of salary; a 5-year average or whatever their target would be, could end up with a situation where it would be 200 percent of their goal beyond that.

Mr. **Ng**. Mr. Chairman, I do not think that Mr. Morse or I are sufficiently conversant in the area of pensions to really give a truly responsive answer to that question. I think that the only thing we can say on this point is that the issues that we are litigating are mandatory retirement issues. We have not challenged any voluntary retirement plans and we certainly do not insist, no one is insisting that persons do not take advantage of State or municipal plans that offer early retirement dates.

The only issue is mandatory, retirement and also we are certainly not insisting that the States and municipalities employ any persons, whether they be 29 or 65, who are unfit. That is really the focus of our litigation, those two points.

Senator **Nickles**. I hear what you are saying, but I am also thinking that a State or city would have to prove the person be unfit and that could cause a real morale problem, et cetera, in employment practices and relationships between management and employees.

Mr. **Morse**. A couple of quick points concerning your cost question. I think another cost factor to consider, which is covered in the article attached to Chairman Thomas' statement, is the fact that if you do individual assessment of fitness, rather than using mandatory retirement ages, there can be substantial cost savings for the employers.

The study of the Los Angeles County Fire Department indicated that during a 14-year program of fitness training and medical screening, they had a 25-percent drop in workers compensation claims, that between the period of 1975 to 1977 and 1981 to 1983, their workers compensation costs dropped $1.4 million, and during that same period they had workers compensation claims drop 50 percent.

Also in terms of believing that mandatory retirement age insures a fit work force, that particular fire department which has 1,800 firefighters, has not had a coronary event while fighting fires during the length of their 14-year program. So I think the evidence suggests that the healthrelated problems seen with firefighting may be more closely related to the absence of fitness testing than in the retention of mandatory retirement ages.

Senator **Nickles**. Federal firefighters now have a retirement age of 55; is that correct?

Mr. **Morse**. Federal law generally requires retirement at age 55, but it can also be extended to 60. It is also significant that in the legislation, which required mandatory retirement for federal firefighters and law enforcement officers, also removed the requirements that the duties be hazardous to obtain special early retirement benefits. That is no longer a part of the federal legislation.

Senator NICKLES. Federal firefighters are exempt, but yet State firefighters are not?

Mr. MORSE. That is correct.

Senator NICKLES. Does that seem right to you?

Mr. MORSE. I think that is a matter for Congress to decide, and it is an inconsistency.

Senator NICKLES. Let me pursue that just a little bit further. Presently, the State police and State highway patrol in Oklahoma, Kentucky, and New Jersey, are under ADEA but the FBI and the Secret Service are not. Congress had determined that the Federal police force is exempt. Right now the State police force and city police force is under the requirement?

Mr. NG. Mr. Chairman——

Senator NICKLES. Is that correct?

Mr. NG [continuing.] That is correct. As we understand what happened was that during the time Congress considered the extension of the ADEA to cover the States, the issue of the coverage of State law enforcement officers, as opposed to Federal law enforcement officers, was in fact recognized, and at that time it was decided to defer the issue of Federal law enforcement officers. Evidently, the sponsors of the bill were aware that there would be this inconsistency, decided to deal with State problems first and not deal with Federal problems at that moment.

Senator NICKLES. Do you think a lot of members might have thought that State police and firefighters' occupational and hazardous-type positions would have qualified under the bona fide occupation qualification?

Mr. NG. I do not think so. Mr. Chairman—I cannot really speculate on it, it might have been that—but I think that the overriding thought was that most individuals probably did not know and preferred to leave it to be decided on a case-by-case basis.

Senator NICKLES. Apparently Congress passed an act and did not do some of the detail work. There is one question outside of this arena that I am interested in. The *Sears* case has been pending. Mr. Ng, you have been involved with that case, I believe for a long time, or at least EEOC has been involved with it. Possibly Mr. Morse you have been involved with it as well. Is EEOC going to appeal that case?

Mr. NG. No decision has been made yet in that case, Mr. Chairman.

Senator NICKLES. Could you submit to my office the amount of money and time that the EEOC has spent pursuing the *Sears* case?

Mr. NG. We can, and I think the figure was somewhere in the neighborhood of $4 million during the course of the case after it proceeded in court.

Senator NICKLES. Around $4 million?

Mr. NG. Yes, sir.

Senator NICKLES. How large is the legal staff of the EEOC?

Mr. NG. The legal staff is approximately 250 attorneys nationwide, sir.

Senator NICKLES. How many of them were working on the *Sears* case?

Mr. NG. I think our litigation team during the time the case was in trial was somewhere in the neighborhood of six or seven. I could give you the exact figure. I do not recall.

Senator NICKLES. If you would. The *Sears* case has been going on for how many years?

Mr. NG. It was filed—I do not recall the date or the year it was filed.

Senator NICKLES. Twelve years?

Mr. NG. It was filed in 1979, I think. Well, the case had been in investigation for some time after the charge was filed, and the charge I think was filed in the early seventies. The case was actually filed in court sometime later.

Senator NICKLES. Are you embarrassed at the way the EEOC has handled the *Sears* case?

Mr. NG. Mr. Chairman, I have been a civil servant for 10 years now and I have learned one thing and that is that you do your job and you keep on doing your job and we do not—I am not going to comment on how the agency as an institution may feel about it, but that is the way I feel.

Senator NICKLES. Submit, if you would, the information on the costs of that case. I am interested in seeing whether or not you would pursue it. I do not think you have a case. I think the district courts have proven that time and time again in the court cases. Please provide me with that information.

Mr. NG. We will.

[Information subsequently supplied follow:]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
CONGRESSIONAL AFFAIRS

APR 24 1986

Mr. James W. Powell
Editor
Senate Committee on Labor
and Human Resources
428 Dirksen SOB
Washington, D.C. 20510

Dear Mr. Powell:

As requested, we are returning a corrected and edited copy of the transcript which contains the statement and remarks made by Mr. William H. Ng, Deputy General Counsel, and Mr. Kenneth Morse, Senior Trial Attorney.

Additionally, during the hearing, Chairman Nickles asked Mr. Ng to provide the Subcommittee with a breakdown of the costs incurred by the Commission in investigating and litigating its sex discrimination case against Sears. We have been informed by the Office of General Counsel that after the complaint was filed in court, the Commission incurred approximately $2.8 million for expert witness services and $521,415 for non-expert services, supplies and travel.

Additionally, the salaries of the attorneys assigned to Sears case from 1979 to 1986 amounted to approximately $1.25 million. Finally, although the Office of General Counsel does not have precise information on the expenses incurred by the Commission during the investigation and conciliation of the case, 1973 - 1979, we believe that the costs incurred by the Commission during this phase, which were primarily personnel costs, amounted to approximately $400,000. Accordingly, we estimate that the total expenses incurred by the Commission during the investigation, conciliation and trial litigation of this case would amount to approximately $5 million.

Sincerely,

Phyllis Berry

Phyllis Berry
Director

Senator NICKLES. Thank you very much for your appearance here today.

Our next panelist are, Donald Cahill, a member of the National Legislative Committee for the National Fraternal Order of Police, from Virginia; William Sommers representing the International Association of Chiefs of Police; Harold Schaitberger representing the National Association of Fire Fighters, and Robert Bellumo representing the International Association of Chiefs of Fire Chiefs.

Mr. Shaitberger, we welcome you. You have been with us before with the *Garcia* case and others. We will enter all statements in the record in full, and if you would summarize those I would certainly be most appreciative. Would you care to proceed.

STATEMENT OF HAROLD A. SCHAITBERGER, DIRECTOR, DEPARTMENT OF GOVERNMENTAL AFFAIRS AND PUBLIC RELATIONS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS; DONALD L. CAHILL, MEMBER, LEGISLATIVE COMMITTEE, NATIONAL FRATERNAL ORDER OF POLICE; WILLIAM SUMMERS, DIRECTOR, LEGAL SERVICES, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; AND ROBERT BELLUMO, DEPUTY CHIEF, BALTIMORE CITY FIRE DEPARTMENT, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF FIRE CHIEFS, INC

Mr. SCHAITBERGER. Thank you, Mr. Chairman. If I could, I would like to just take a moment to extend the appreciation of our international union to the chairman of the subcommittee and Senator Metzenbaum, the ranking minority member, for your leadership in enacting and working toward what we believe is landmark legislation in the 1985 amendments to the Fair Labor Standards Act. They are ready to go into effect in another 30 days and we look forward to that coverage and we thank the subcommittee and its staff for their work in this area.

Senator NICKLES. We appreciate your cooperation in that as well.

Mr. SCHAITBERGER. The International Association of Fire Fighters represents approximately 170,000 professional fire fighters throughout the United States and Canada. We therefore take a deep interest in the impact of the Age Discrimination in Employment Act on public safety employees.

We would first like to express our appreciation to the subcommittee chairman for his timely scheduling of hearings on this important issue.

Let me state at the outset that the IAFF wholeheartedly supports the ADEA and all efforts to ban discrimination on account of age, race, religion, sex, or national origin.

However, there are professions in which a mandatory retirement age and a maximum hiring age are crucial to the competent performance of the job. We believe that employment policies which consider age as an eligibility factor for professions such as fire fighting, which require great physical exertion, are based on objective facts and hence have merit.

I would like to take the next few moments to examine the nature of fire fighting. Firefighters are constantly making transitions from the calm, peaceful environment of the firehouse to the hostile atmosphere of a fire. These constant transformations from quiet to raging infernos have numerous physiological and psychological side effects. Within 15 to 30 seconds after the fire alarm sounds, research studies have found that a firefighter's heart rate can increase by as much as 117 beats per minute. In addition, a firefighter's heart can beat twice its normal rate throughout the entire fire fighting operation.

The temperature inside a burning structure can range anywhere from several hundred degrees to 1,500 degrees. The firefighter must be able to endure this extreme heat, intense smoke and fumes, and the psychological stress of being in a life-threatening situation in order to successfully extinguish the fire and rescue any victims.

Data shows that firefighters contract heart and pulmonary disease almost twice as often as the general public. The adverse health effect of fire fighting are cumulative. Although firefighters as a population are healthier and in better physical condition than the general population for most of their adult lives, when they reach their fifties they are afflicted with chronic, debilitating diseases such as heart and pulmonary disease at a significantly higher rate than the general population. In fact, the correlation between fire fighting and these chronic diseases is so strong that 36 States have presumptive diability rules for firefighters who become afflicted with certain heart or pulmonary diseases.

We believe that there is ample evidence that younger firefighters can better cope with the strains of fire fighting than can older ones due to the physical infirmities that characteristically afflict older men and women. The older the firefighter, the greater the odds are that he or she will become injured, disabled, or die while on duty.

Placing older employees with a high risk of injury and disease into an emergency situation greatly increases the risk that they will suffer an injury or die in the line of duty. In a fire situation, this would not only endanger the older firefighter, but also the other members of the fire fighting team.

Unfortunately, history has proven to us that if one member of a fire-fighting unit fails to fulfill his duties, the lives of those who they are protecting and the lives of the other firefighters are seriously jeopardized.

We believe that it is clear that considering the firefighters' duties and environment and the fact that younger men and women can more easily and more safely perform fire fighting duties, it is only reasonable that rules which safeguard the youthful vigor be maintained.

I also want to note that our military forces have used age-based eligibility rules in the interest of maintaining young and a vigorous armed forces. A historical look back to Roman times shows that armies of the modern world have always been comprised of young, physically fit individuals.

Our own armed forces have determined that this criteria is necessary in order to adequately protect our Nation's interests. The age criteria for recruiting personnel into the U.S. Navy is 17 to 34; the U.S. Army, 17 to 35; the U.S. Marine Corps, 17 to 28; and the U.S. Air Force is 17 to 26. Fire fighting is much like being at war, except that our people are fighting a war every single day.

Beyond the safety issues, the IAFF believes that there are financial considerations that support the concept of involuntary retirement. Since older firefighters who are nearing their retirement tend to be more susceptible to physical infirmities, a greater proportion of employees in this age bracket receive disability benefits than employees in younger age brackets.

The employer is now forced to spend more on older workers who were injured in the line of duty since disability benefits cost substantially more than normal retirement benefits. The employer is additionally compelled to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher than average risk of illness.

Some individuals have suggested that there are medical and scientific tests which could accurately determine a firefighter's ability to perform in emergency situations. We question the validity of such tests. To date, there is absolutely no evidence to suggest that tests of this nature are accurate.

Where fire fighting is concerned, the price of any error in these tests is far too high for society to pay.

The Age Discrimination in Employment Act provides that it is not unlawful for an employer to make age-based employment decisions "where age is a bona fide occupational qualification reasonably necessary to the operation of that particular business***" We believe there is ample scientific and medical evidence available to successfully define age rules for public safety employees. Many courts have already recognized age as a bona fide qualification for public safety employees.

As an example, the U.S. district court in Illinois decided in June of 1985 that the State's mandatory retirement rule for troopers was adequately supported by medical evidence that fitness declines with age and that there was an overriding public policy interest in having a young, physically fit tooper force.

The same conclusion was reached by the eighth circuit court of appeals in 1982 in a case, upholding a mandatory retirement rule in the Missouri Highway Patrol.

For these reasons, we urge Congress to act to exclude State and local government public safety employees from the provisions of ADEA. The IAFF will fully support legislation to allow States and municipalities the flexibility to determine retirement ages for their own law enforcement officers and firefighters, just as Congress has done for certain classes of Federal Government workers who regularly face unique mental and physical demands.

That concludes our testimony, Mr. Chairman, and I will be glad to answer any questions you may have at the end of the panel's presentation.

[The prepared statement of Mr. Schaitberger follows:]

TESTIMONY

BEFORE THE

LABOR SUBCOMMITTEE

of the

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON

AGE DISCRIMINATION IN EMPLOYMENT ACT

MARCH 18, 1986

Harold A. Schaitberger

Director

Department of Governmental Affairs and Public Relations

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
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Mr. Chairman, members of the Subcommittee, my name is Harold Schaitberger and I am the Legislative Director of the International Association of Fire Fighters (IAFF), AFL-CIO-CLC. The IAFF represents approximately 170,000 professional fire fighters throughout the United States and Canada. We, therefore, take a deep interest in the impact of the Age Discrimination in Employment Act on retirement policy for public safety employees.

We would first like to express our appreciation to the Subcommittee Chairman for his timely scheduling of hearings on this important issue.

Let me state at the outset that the IAFF wholeheartedly supports the ADEA and all efforts to ban discrimination on account of age, race, religion, sex or national origin. Most arbitrary age discrimination occurs due to stereotyping that is largely unsupported by objective facts. It was precisely this sort of discrimination that the ADEA was created to prohibit.

However, there are professions in which a mandatory retirement age and a maximum hiring age are crucial to the competent performance of the job. Most often, great physical and mental demands are inherent elements of these professions. Fire fighting is one of those professions. We believe that employment policies which consider age as an eligibility factor for professions such as fire fighting, which require great physical exertion, are based on objective facts and hence have merit.

I would like to take the next few moments to examine the nature of fire fighting. Fire fighters are constantly making transitions from the calm, peaceful environment of the firehouse to the hostile atmosphere of a fire. These constant transformations from quiet to raging infernos have numerous psychological and physiological side effects. Within 15-30 seconds after the fire alarm sounds, research studies have found that a fire fighter's heart rate can increase by as much as 117 beats per minute. In addition, a fire fighter's heart can beat at twice its normal rate throughout the entire fire fighting operation.

The temperature inside a burning structure can range anywhere from several hundred degrees to 1500 degrees. The fire fighter must be able to endure this extreme heat, intense smoke and fumes, and the psychological stress of being in a life threatening situation in order to successfully extinguish the fire and rescue the victims. To do so, the fire fighter must be in top physical condition and have superior mental acuity.

These extreme physiological and psychological stresses very often lead to severe coronary and pulmonary problems in fire fighters. Numerous studies have documented this correlation. The data shows that fire fighters contract heart and pulmonary disease almost twice as often as the general population. The adverse health effects of fire fighting are cumulative; although fire fighters as a population are healthier and in better physical condition than the general population for most of their adult lives, when they reach their 50's they are afflicted with chronic, debilitating diseases such as heart and pulmonary disease at a significantly higher rate than the general population.* In fact, the correlation between fire fighting and these chronic diseases is so strong, that 36 states have presumptive disability rules for fire fighters who become afflicted with certain heart or pulmonary diseases.

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* See for example, Bernard, R.J. Ph.D, "Heart Disease in Fire Fighters" Fire Command, August, 1979. Ferguson, E.W., M.D., Ph.D, "Detection of Coronary Artery Disease in Fire Fighters Without Symptoms" International Fire Chief, April 1981. Peters, J.M., M.D. "Chronic Effect of Fire Fighting on Pulmonary Function" New England Journal of Medicine, December 19, 1974.

Complicating the problem is the fact that studies have shown that atherosclerotic coronary artery disease is often asymptomatic and the first indication of heart disease is a heart attack and/or sudden death.**

Fire fighting is one of the most dangerous professions in the world and fire fighters who are not in top physical condition endanger themselves, their co-workers and the communities they serve. To put the hazardous nature of fire fighting in perspective, it is important to note that deaths of fire fighters in the line of duty are the highest in the nation and outnumber law enforcement officers approximately two to one. This year alone it can be expected that over 40 percent of fire fighters will be injured to varying degrees in the line of duty. It is clear that fire fighting demands physical and mental acuity which should never be compromised.

** See for example, Myerburg, R.J., Davis, J.H. "The Medical Ecology of Public Safety: Sudden Death Due to Coronary Heart Disease" American Heart Journal 68:586, 1964. Waller, B.F., Roberts, W.C. "Sudden Death While Running in Conditioned Runners Aged 40 Years and Over" American Journal of Cardiology 45:1292-1300, 1980. Ferguson, E.W., M.D., Ph.D "Detection of Coronary Artery Disease in Fire Fighters Without Symptoms" International Fire Chief, April, 1985.

We believe that there is ample evidence that younger fire fighters can better cope with the strains of fire fighting than can older ones due to the physical infirmities that characteristically afflict older men and women. In this respect, the data on fire fighters and heart and pulmonary disease is particularly compelling. The older the fire fighter, the greater the odds are that he or she will become injured, disabled, or die while on duty. Placing older employees with a high risk of injury and disease into an emergency situation, greatly increases the risk that they will suffer an injury or die in the line of duty. In a fire situation, this would not only endanger the older fire fighter, but also the other members of the fire fighting team.

To successfully meet the challenges of modern fires, fire fighters must work as a team. This means that each member of a fire fighting unit must rely on one another. Unfortunately, history has proven to us that if one member of a fire fighting unit fails to fulfill his duties, the lives of those who they are protecting and the lives of the other fire fighters are seriously jeopardized. Where fire fighters are concerned, the older the fire fighter is, the greater the chance that others could be endangered.

We believe that it is clear that considering the fire fighters' duties and environment and the fact that younger men and women can more easily and more safely perform fire fighting duties, it is only reasonable that rules which safeguard the youthful vigor be maintained. Here we are discussing an issue of safety. Safety, not only for those endangered by fires and accidents, but also the lives of colleagues.

Also, I want to note that our military forces have used age-based eligibility rules in the interest of maintaining young and vigorous armed forces. A historical look back to Roman times shows that the armies of the modern world have always been comprised of young physically fit individuals. Our own armed forces have determined that this criteria is necessary in order to adequately protect our nation. The age criteria for recruiting personnel into the U.S. Navy is 17-34; U.S. Army is 17-35; U.S. Marine Corp is 17-28 and U.S. Air Force is 17-26. Fire fighting is much like being at war except that our people are fighting a war every day. The standards used by our armed services are adequate and necessary for our public safety employees.

It should be clear that fire fighters were not the first to bring to Congress' attention the adverse effects the ADEA may have on the operation of a physically demanding profession. Title 5 U.S. Code 8335 specifically acknowledges the physical and mental demands of air traffic controllers, federal law enforcement officers and federal fire fighters and logically exempts these professions from the ADEA.

No one would risk an aviation disaster by allowing physically suspect air traffic controllers to continue working and certainly no responsible individual would advocate an aged military force. So, when you consider disability and death rates it quickly becomes obvious that fire fighters, like air traffic controllers, federal law enforcement officers, federal fire fighters and military officers should be excluded from prohibitions against age requirements.

The notion that age is sometimes a legitimate occupational requirement is certainly not new. Indeed, the founding fathers recognized this when they drafted the Constitution and included minimum age requirements for holding the offices of President, Senator or Member of Congress.

Beyond the safety issues, the IAFF believes that there are financial considerations that support the concept of involuntary retirement. Since older employees who are nearing their retirement tend to be more susceptible to physical infirmities, a greater proportion of employees in this age bracket receive disability benefits than employees in younger age brackets. The employer is now forced to spend more on older workers who were injured in the line of duty since disability benefits cost substantially more than normal pension benefits. The employer is additionally compelled to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher than average risk of illness.

Some individuals have suggested that there are medical and scientific tests which could accurately determine a fire fighter's ability to perform in emergency situations. We question the validity of such tests. To date, there is absolutely no evidence to suggest that tests of this nature are accurate. Where fire fighting is concerned, the price of any error in these tests is far too high for society to pay. We invite members of the medical community to examine these tests and to testify before this subcommittee on the accuracy of these tests. In the final analysis, we believe that you will find that medical tests cannot simulate the fire fighting atmosphere and that age is the safest predictor of ability to perform fire fighting functions. Moreover, even if a there were a test which could accurately predict an individual fire fighter's fitness, it would create an unreasonable and impractical burden on municipalities who would be forced to regularly administer hundreds or thousands of tests in an attempt to properly man their departments.

The Age Discrimination in Employment Act provides that it is not unlawful for an employer to make age-based employment decisions "where age is a bona fide occupational qualification reasonably necessary to the operation of that particular business..." We believe there is ample scientific and medical evidence available to successfully defend age rules for public safety employees. Many courts have already recognized age as a BFOQ for public safety employees. As an example, the U.S. District Court in Illinois decided in June, 1985 that the state's mandatory retirement rule for troopers was adequately supported by medical evidence that fitness declines with age and that there was an overriding public policy interest in having a young, physically fit trooper force. (Popkins v. Zagel, 611 F. Supp. 809 (D.C. Ill. (1985)). The same conclusion was reached by the 8th Circuit Court of Appeals in a 1982 case upholding a mandatory retirement rule in the Missouri Highway Patrol. (EEOC v. Missouri State Highway Patrol, 748 F. 2d 447 (1984)). However, this BFOQ exception for age-based employment rules will create a great deal of litigation as cities and states around the country are called upon one by one to defend their rules. The result will be an unreasonable and burdensome litigation load on our federal and state courts.

For these reasons, we urge Congress to act to exclude state and local government public safety employees from the provisions of ADEA. The IAFF will fully support legislation to allow states and municipalities to determine retirement ages for their own law enforcement officers and fire fighters, just as Congress has done for certain classes of Federal government workers who regularly face unique mental and physical demands.

That concludes my testimony Mr. Chairman. I will be happy to answer any questions the committee may have.

Senator NICKLES. Mr. Schaitberger, thank you very much for your comments.

Mr. Cahill.

Mr. CAHILL. Thank you, Mr. Chairman. I am speaking in behalf of the National Fraternal Order of Police, which is the largest police organization in the United States, with an active roster of over 175,000 law enforcement officers.

In the Fraternal Order of Police, we have Federal law enforcement officers from every Federal agency in the Government, State organizations, county, city, and towns.

On behalf of the National Fraternal Order of Police, we thank you, Mr. Chairman and members of your committee, for consideration of this bill.

We reaffirm the position of virtually every law enforcement agency in the United States that a 70-year-old man or woman has no business being out there on the street protecting our citizens. We, as older police officers, are not physically fit to handle the job.

Senior officers do have their place in law enforcement, their knowledge, their experience and expertise can certainly be channeled into the best law enforcement positions available, but we all have to realize, Mr. Chairman, that there are only so many of those positions available. When I speak of those positions, I am speaking of police academy positions, administrative positions. We can only finance so many of those positions.

Senior officers cannot be and should not be placed in dangerous situations where either the officer or a bystander can be injured.

I will leave my statement as submitted and would be glad to answer any questions that you might have for the panel.

[The prepared statement of Mr. Cahill follows:]

TESTIMONY OF FRATERNAL ORDER OF POLICE ON AMENDING THE AGE DISCRIMINATION ACT OF 1967 TO U.S. SENATE LABOR SUBCOMMITTEE

Mr. Chairman, Members of the Subcommittee:

My name is Donald L. Cahill and I am a member of the Legislative Committee of the National Fraternal Order of Police. Ours is the largest police organization in the United States with an active roster of over 175,000 members throughout our country.

On behalf of the National Fraternal Order of Police, I would like to thank the Chairman and members of the Subcommittee for their consideration of Senate Bill 1240. We fully agree with the purpose of this bill to amend the Age Discrimination in Employment Act of 1967 to exclude state and municipal fire fighters and law enforcement officers from the requirements concerning the age at which individuals may be hired or mandatorily retired.

In the name of Law Enforcement, I am here today to ask that you give the states the right to establish a bona fide occupational qualification (BFOQ) when they recognize the stressful and hazardous duties of State, County, and Municipal Law Enforcement work to be such that mandatory hiring and retirement ages are needed.

The states want the right to consider the nature of the job, and it's hazards, in determining hiring and retirement age standards. There is no basis for a different BFOQ standard between Federal, State and Local Law Enforcement.

We also reaffirm the position of virtually every law enforcement agency that the Equal Employment Opportunity Commission (EEOC) vs. Wyoming decision, which invalidated mandatory retirement of a law enforcement officer before age seventy (70), must be legislatively addressed to give state and local governments the ability to set reasonable standards.

We have the duty and responsibility of providing our citizenry with the best possible law enforcement protection. State and local governments, in cooperation with their police organizations, must have the authority to control age requirements for hiring and retirements of their own law enforcement personnel, to achieve cost effective and productive enforcement practices.

In 1984 alone, the following crimes statistics are available:

18,692	Homicides
485,008	Robberies
685,349	Aggravated Assaults
3,000,000	Burglaries
84,000	Rapes

We are a nation involved in an internal, and eternal, war on crime. Our war is not a statistical game. It is for real - with real people dying, bleeding and falling victim to the criminal every day. Our citizenry does have a right to expect effective and capable law enforcement to prevent these heinous crimes from being commited. The citizens expect to have physically and mentally capable officers respond to the scenes of crime and apprehend the perpetrator(s).

We want officers available who can be expected to wrestle any felon!

Our senior officers do have their place in the law enforcement work force. Their knowledge, experience and expertise can certainly be channeled to the best public law enforcement position available. However, we must also realize that there are only so many of these positions available. These senior officers should not be placed in a highly dangerous situation where either the officer or someone else may be injured.

There is not a large number of law enforcement officers approaching the age of 70 years actively patrolling our streets, but state and local governments must have the ability to prevent dangerous situations from occurring by having the right to set reasonable standards.

Help public safety by keeping Law Enforcement fit and able. Your vote for an amendment to ADEA can help maintain efficient, effective Law Enforcement.

Thank you for allowing me to present our testimony for your consideration.

Senator NICKLES. Mr. Cahill, thank you very much. I appreciate your comments.

Mr. Summers.

Mr. SUMMERS. Thank you, Mr. Chairman. I am William Summers, director of legal services for the International Association of Chiefs of Police and, on behalf of our membership, I would like to thank you and the members of the subcommittee for providing us an opportunity to present our views regarding the need for amendment of the Age Discrimination in Employment Act.

The IACP is a voluntary professional organziation comprised of chiefs of police and other law enforcement personnel from all sections of the United States and 60 nations. Command personnel within the United States constitute over 75 percent of the more than 13,500 members. We address this subcommittee on behalf of the vast majority of our members who believe that the public's safety can be better protected if State and local governments have the authority to control and establish age requirements for their law enforcement personnel.

We believe that when Congress amended the ADEA in 1978, extending its application to the States, it did not intend for law enforcement agencies to be affected. Unfortunately, these agencies have been affected.

Congress was well aware of the demands placed on law enforcement officers when it authorized mandatory retirement of Federal law enforcement officers. Its intent was clearly stated in the legislative history of the act.

In *EEOC* v. *Wyoming*, the Supreme Court for the first time applied the ADEA to a State employee and struck down a State law requiring game wardens to retire at age 55. Prior to that time, most law enforcement agencies had established retirement schedules and had policies setting maximum hiring age. Subsequent to *Wyoming*, many of these agencies have been forced to abandon these policies which were intended to insure the efficient and effective operation of a particular agency.

Clearly, when Congress extended the ADEA to State and local governments in 1978, it did not intend to hamper State and local law enforcement agencies. The act contains the BFOQ exception that has already been stated. Congress apparently believed that the compulsory retirement of law enforcement agencies would fall within the BFOQ. This again is clearly stated in the legislative history.

Unfortunately, although Congress' intent is clear in the legislative history, it was not explicitly stated in the statute. Since the statute appears clear and unambiguous on its face, courts have not looked at the legislative history and, consequently, law enforcement has been treated like all other occupations by the courts.

What has resulted is that law enforcement agencies have had to justify their hiring and retirement policies on a case-by-case basis. This is an expensive and time-consuming duplication of effort. Furthermore, conflicting judicial holdings have created a nightmare of chaos and confusion in State and local law enforcemeat agencies. While some agencies have had the resources needed to successfully prove that their age limits are a BFOQ, other agencies have not.

Police work is often active, physical and stressful. An officer's duties may involve handling verbal and physical resistance from suspects such as violent drunks or fleeing suspects. Apprehending a suspect may necessitate a chase during which the officer must drive at high speeds, maneuvering his vehicle through traffic. He may also be :involved in a foot chase. In addition, officers may be called upon to carry citizens to safety at an accident scene or to push a disabled vehicle out of traffic.

Even officers assigned to desk jobs may become involved in these situations. Any officer may be called out in an emergency.

It is a logical and necessary part of a successful law enforcement personnel program that officers not be past the age of effective physical reaction and performance. An officer may place both his life and the lives of others in considerable danger if he is unable to react quickly, physically and appropriately. No amount of fitness training can compensate for the natural decline in physical ability that comes with age.

Aerobic capacity declines with age. Generally, an individual loses about 10 percent of his aerobic capacity each decade after 20, thus by age 60 he will have lost approximately 35 to 40 percent. Although sustained exercise can increase an individual's capacity, the maximum increase is 10 percent.

Thus, as individuals age, physiological changes affect their ability to perform. The body's ability to make efficient use of oxygen declines, with a resulting decline in physical stamina. In addition, muscle strength declines as an individual ages.

Coronary heart disease offers another potential problem for older law enforcement officers. Although age does not cause coronary heart disease, data reveals an increase in the number of initial discoveries of coronary heart disease as age increases. Latent coronary heart disease presents the danger that, in times of stress, such as sudden exertion in cold weather or during a confrontation, an officer's adrenaline response may push him into total body collapse or heart attack.

There is no single test or battery of tests that safely measures the officer's ability to perform his duties and identifies with reasonable accuracy the presence of coronary artery disease. Physical traumas can be absorbed by younger officers but may be major problems for older officers.

State and local governments, many of which are struggling to remain solvent, cannot afford to bear the extra cost of paying disability pensions for officers who should have been retired earlier. Also, early retirement systems have been a means for promoting morale within the agencies.

In *Vance* v. *Bradley*, the Supreme Court upheld legislation which permitted the Foreign Service to retire personnel at age 60. The Court held that the retirement system created a predictable promotional opportunity and thus spurred morale and stimulated superior performance in the ranks.

Another factor that should be considered is the impact on minority groups and women if compulsory retirement is not permitted. Affirmative action goals established by the States will to some extent be nullified. With fewer retirements, a law enforcement agency's authorized strength will not be depleted to the point which has historically allowed for the start of several recruit classes per year.

Furthermore, those minorities and women who are already in place in public safety organizations will be denied the opportunity to advance to positions of higher responsibility since fewer positions will be available.

In light of the above-stated facts, the IACP urges Congress to pass legislation exempting State and local law enforcement agencies from the restrictions of the AEDA.

Thank you.

[The prepared statement of The International Association of Chiefs of Police presented by Mr. Summers follows:]

STATEMENT OF INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

I AM JERALD R. VAUGHN, EXECUTIVE DIRECTOR OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE. ON BEHALF OF THE MEMBERSHIP OF IACP, I WOULD LIKE TO THANK SENATOR NICKLES AND THE MEMBERS OF THIS SUBCOMMITTEE FOR PROVIDING US THE OPPORTUNITY TO PRESENT OUR VIEWS REGARDING THE NEED FOR AMENDMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

THE IACP IS A VOLUNTARY PROFESSIONAL ORGANIZATION ESTABLISHED IN 1893. IT IS COMPRISED OF CHIEFS OF POLICE AND OTHER LAW ENFORCEMENT PERSONNEL FROM ALL SECTIONS OF THE UNITED STATES AND MORE THAN SIXTY NATIONS. COMMAND PERSONNEL WITHIN THE UNITED STATES CONSTITUTE OVER SEVENTY-FIVE PERCENT OF THE MORE THAN 13,500 MEMBERS. THROUGHOUT ITS EXISTENCE, THE IACP HAS STRIVEN TO ACHIEVE PROPER, CONSCIENTIOUS AND RESOLUTE LAW ENFORCEMENT. IN ALL OF ITS ACTIVITIES, THE IACP HAS BEEN CONSTANTLY DEVOTED TO THE STEADY ADVANCEMENT OF THE NATION'S BEST WELFARE AND WELL-BEING. WE ADDRESS THIS SUBCOMMITTEE ON BEHALF OF THE VAST MAJORITY OF OUR MEMBERS WHO BELIEVE THAT THE PUBLIC'S SAFETY CAN BE BETTER PROTECTED IF STATE AND LOCAL GOVERNMENTS HAVE THE AUTHORITY TO CONTROL AGE REQUIREMENTS FOR THEIR OWN LAW ENFORCEMENT PERSONNEL.

WE BELIEVE THAT WHEN CONGRESS AMENDED THE ADEA IN 1978, EXTENDING ITS APPLICATION TO THE STATES, IT DID NOT INTEND FOR LAW ENFORCEMENT AGENCIES TO BE AFFECTED. UNFORTUNATELY, THESE AGENCIES HAVE BEEN AFFECTED.

CONGRESS WAS WELL AWARE OF THE DEMANDS PLACED ON LAW ENFORCEMENT OFFICERS WHEN IT AUTHORIZED MANDATORY RETIREMENT OF FEDERAL LAW ENFORCEMENT OFFICERS. ITS INTENT, AS INDICATED IN LEGISLATIVE HISTORY, WAS "BASED ON THE NATURE OF THE WORK INVOLVED AND THE DETERMINATION THAT (LAW ENFORCEMENT AND FIRE FIGHTING AGENCIES) SHOULD BE COMPOSED, INSOFAR AS POSSIBLE OF YOUNG MEN AND WOMEN PHYSICALLY CAPABLE OF MEETING THE VIGOROUS DEMANDS OF OCCUPATIONS WHICH ARE FAR MORE TAXING PHYSICALLY THAN MOST IN THE FEDERAL SERVICE. THEY ARE OCCUPATIONS CALLING FOR THE STRENGTH AND STAMINA OF THE YOUNG, RATHER THAN THE MIDDLE AGED." (S.REP. NO. 93-948, 93RD CONG. 2ND SESS. (1974) REPRINTED IN 1974 IN U.S. CODE CONG. AND AD. NEWS 3699, 3701.)

CONGRESS FIRST ATTEMPTED TO ACHIEVE THE GOAL OF A YOUNGER, MORE ACTIVE AND MORE VIGILANT LAW ENFORCEMENT AND FIREFIGHTING WORK FORCE BY ENCOURAGING OLDER OFFICERS TO RETIRE EARLY. THIS WAS

DONE THROUGH AN ATTRACTIVE PENSION PROGRAM. CONGRESS SOON LEARNED, HOWEVER, THAT THIS WAS ONLY PARTIALLY EFFECTIVE. IN MANY CASES THE MOST ALERT AND AGGRESSIVE EMPLOYEES FOUND DESIRABLE JOBS OUTSIDE OF GOVERNMENT AND RETIRED IN THEIR EARLY FIFTIES. THOSE WHO WERE LESS VIGOROUS AND LESS CAPABLE AND THEREFORE UNABLE TO FIND OTHER EMPLOYMENT TENDED TO STAY WITHIN THE FEDERAL SERVICE UNTIL MUCH LATER IN THEIR LIVES. STATE AND LOCAL LAW ENFORCEMENT AGENCIES ARE FACED WITH THIS SAME PROBLEM IF THEY ATTEMPT TO ENCOURAGE, RATHER THAN MANDATE, EARLY RETIREMENT.

IN EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WYOMING, 460 U.S. 226 (1983) THE SUPREME COURT FOR THE FIRST TIME APPLIED THE ADEA TO A STATE EMPLOYEE, AND STRUCK DOWN A STATE LAW REQUIRING STATE GAME WARDENS TO RETIRE AT AGE 55. PRIOR TO THAT TIME MOST LAW ENFORCEMENT AGENCIES HAD ESTABLISHED RETIREMENT SCHEDULES DEMANDING THE RETIREMENT OF PERSONNEL SOMEWHERE BETWEEN THE AGES OF 50 TO 75. MOST ALSO HAD POLICIES SETTING A MAXIMUM HIRING AGE. SUBSEQUENT TO WYOMING, MANY OF THESE AGENCIES HAVE BEEN FORCED TO ABANDON THESE POLICIES WHICH WERE INTENDED TO INSURE THE EFFICIENT AND

EFFECTIVE OPERATION OF THE PARTICULAR AGENCY.

CLEARLY, WHEN CONGRESS EXTENDED THE ADEA TO STATE AND LOCAL GOVERNMENTS IN 1978, IT DID NOT INTEND TO HAMPER STATE AND LOCAL LAW ENFORCEMENT AGENCIES. THE ACT CONTAINS AN EXCEPTION, RECOGNIZED IN WYOMING, ALLOWING EMPLOYERS:

> (1) TO TAKE ANY ACTION OTHERWISE PROHIBITED UNDER SUBSECTIONS (A), (B), (C), OR (E) OF THIS SECTION WHERE AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION REASONABLY NECESSARY TO THE NORMAL OPERATION OF THE PARTICULAR BUSINESS, OR WHERE THE DIFFERENTIATION IS BASED ON REASONABLE FACTORS OTHER THAN AGE. 29 U.S.C. §623 (F)(1)

THIS IS COMMONLY TERMED THE BFOQ EXCEPTION. CONGRESS APPARENTLY BELIEVED THAT COMPULSORY RETIREMENT IN LAW ENFORCEMENT AGENCIES WOULD FALL WITHIN THE BFOQ. IN THE LEGISLATIVE HISTORY OF THE 1978 AMENDMENTS IT STATED:

> THE COMMITTEE INTENDS TO MAKE CLEAR THAT UNDER THIS LEGISLATION AN EMPLOYER WOULD NOT BE REQUIRED TO RETAIN ANYONE WHO IS NOT QUALIFIED TO PERFORM A PARTICULAR JOB. FOR EXAMPLE, IN CERTAIN TYPES OF PARTICULARLY ARDUOUS LAW ENFORCEMENT ACTIVITY, THERE MAY BE A FACTUAL BASIS FOR BELIEVING THAT SUBSTANTIALLY ALL EMPLOYEES ABOVE A SPECIFIED AGE WOULD BE UNABLE TO CONTINUE TO PERFORM SAFELY AND EFFICIENTLY THE DUTIES OF THEIR PARTICULAR JOBS, AND IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO DETERMINE THROUGH MEDICAL EXAMINATIONS, PERIODIC REVIEWS

> OF CURRENT JOB PERFORMANCE AND OTHER OBJECTIVE TESTS THE EMPLOYEES' CAPACITY OR ABILITY TO CONTINUE TO PERFORM THE JOBS SAFELY AND EFFICIENTLY.
>
> ACCORDINGLY, THE COMMITTEE ADOPTED AN AMENDMENT TO MAKE IT CLEAR THAT WHERE THESE TWO CONDITIONS ARE SATISFIED AND WHERE SUCH A BONA FIDE OCCUPATIONAL QUALIFICATION HAS THEREFORE BEEN ESTABLISHED, AN EMPLOYER MAY LAWFULLY REQUIRE MANDATORY RETIREMENT AT THAT SPECIFIED AGE. THE COMMITTEE ALSO EXPRESSED ITS CONCERN THAT LITIGATION SHOULD NOT BE THE SOLE MEANS OF DETERMINING THE VALIDITY OF A BONA FIDE OCCUPATIONAL QUALIFICATION. ALTHOUGH THE SECRETARY IS PRESENTLY EMPOWERED TO ISSUE ADVISORY OPINIONS ON THE APPLICABILITY OF BFOQ EXCEPTION, THE COMMITTEE RECOMMENDED THAT THE SECRETARY EXAMINE THE FEASIBILITY OF ISSUING GUIDELINES TO AID EMPLOYERS IN DETERMINING THE APPLICABILITY OF SECTION 4 (F)(1) TO THEIR PARTICULAR SITUATIONS.
>
> S. REP. NO. 94-493, 95TH CONG. 2ND SESS. (1978) REPRINTED IN 1978 IN U.S. CODE CONG. AND AD. NEWS, 513-14.

UNFORTUNATELY, ALTHOUGH CONGRESS' INTENT IS CLEAR IN THE LEGISLATIVE HISTORY, IT WAS NOT EXPLICITLY STATED IN THE STATUTE. SINCE THE STATUTE APPEARS CLEAR AND UNAMBIGUOUS ON ITS FACE, COURTS HAVE NOT LOOKED AT THE LEGISLATIVE HISTORY. CONSEQUENTLY, LAW ENFORCEMENT HAS BEEN TREATED AS ANY OTHER OCCUPATION BY THE COURTS.

WHAT HAS RESULTED IS THAT LAW ENFORCEMENT AGENCIES HAVE HAD TO JUSTIFY THEIR HIRING AND RETIREMENT POLICIES ON A CASE-BY-CASE BASIS. THIS IS AN EXPENSIVE AND TIME CONSUMING DUPLICATION OF EFFORT. FURTHERMORE, CONFLICTING JUDICIAL HOLDINGS HAVE CREATED A NIGHTMARE OF CHAOS AND CONFUSION IN STATE AND LOCAL LAW ENFORCEMENT AGENCIES. WHILE SOME AGENCIES HAVE HAD THE RESOURCES NEEDED TO SUCCESSFULLY PROVE THAT THEIR AGE LIMITS ARE A BFOQ, OTHER SIMILAR AGENCIES HAVE NOT.

POLICE WORK IS OFTEN ACTIVE, PHYSICAL AND STRESSFUL. AN OFFICER'S DUTIES MAY INVOLVE HANDLING VERBAL AND PHYSICAL RESISTANCE FROM SUSPECTS SUCH AS VIOLENT DRUNKS OR FLEEING SUSPECTS. APPREHENDING A SUSPECT MAY NECESSITATE A CHASE DURING WHICH THE OFFICER MUST DRIVE AT HIGH SPEEDS, MANEUVERING HIS VEHICLE THROUGH TRAFFIC. HE MAY ALSO BECOME INVOLVED IN A FOOT CHASE. IN ADDITION OFFICERS MAY BE CALLED UPON TO CARRY CITIZENS TO SAFETY AT AN ACCIDENT SCENE OR TO PUSH A DISABLED VEHICLE OUT OF TRAFFIC OR OUT OF THE SNOW.

EVEN OFFICERS ASSIGNED TO DESK JOBS MAY BECOME INVOLVED IN THESE SITUATIONS. ANY OFFICER MAY BE CALLED OUT IN AN EMERGENCY.

FURTHERMORE, MOST OFFICERS ARE ASSIGNED A FULLY EQUIPPED LAW ENFORCEMENT VEHICLE WHICH IS USED IN TRAVELLING TO AND FROM WORK. ALL OFFICERS, REGARDLESS OF RANK OR ASSIGNMENT ARE REQUIRED TO HANDLE ANY SITUATION THEY ENCOUNTER WHILE IN THEIR VEHICLES—VIOLATIONS OF TRAFFIC LAWS, SOMEONE COMMITTING A FELONY IN THEIR PRESENCE, A LIFE THREATENING SITUATION, ETC.

IT IS A LOGICAL AND NECESSARY PART OF A SUCCESSFUL LAW ENFORCEMENT PERSONNEL PROGRAM THAT OFFICERS NOT BE PAST THE AGE OF EFFECTIVE PHYSICAL REACTION AND PERFORMANCE. AN OFFICER MAY PLACE BOTH HIS LIFE AND THE LIVES OF OTHERS IN CONSIDERABLE DANGER IF HE IS UNABLE TO REACT QUICKLY, PHYSICALLY AND APPROPRIATELY. NO AMOUNT OF FITNESS TRAINING CAN COMPENSATE FOR THE NATURAL DECLINE IN PHYSICAL ABILITY THAT COMES WITH AGE.

AEROBIC CAPACITY, WHICH REFERS TO AN INDIVIDUAL'S ABILITY TO UTILIZE OXYGEN, DEPENDS ON THE EFFICIENCY OF THE INDIVIDUAL'S LUNGS AND CARDIOVASCULAR SYSTEM. THIS IS VERY IMPORTANT IN PHYSICAL ACTIVITY SUCH AS CHASING A SUSPECT OR PUSHING A CAR. A REDUCTION IN AEROBIC CAPACITY MEANS THAT THE OXYGEN SUPPLY IS

INSUFFICIENT, WHICH IN TURN REDUCES THE ABILITY OF THE MUSCLES TO WORK WITHOUT FATIGUE. WHEN THE OXYGEN SUPPLY IS INSUFFICIENT AN INDIVIDUAL'S MUSCLES UTILIZE AN EMERGENCY RESERVE, A SPECIAL METABOLISM BY WHICH THE MUSCLES GENERATE THEIR OWN ENERGY. USING THIS EMERGENCY RESERVE, HOWEVER, GENERATES ONLY LIMITED MUSCULAR FUNCTION, RAPIDLY INDUCES FATIGUE, AND REQUIRES MORE TIME TO RECOVER FROM THE EXERTION.

GENERALLY, AN INDIVIDUAL LOSES ABOUT TEN PERCENT OF HIS AEROBIC CAPACITY EACH DECADE AFTER AGE TWENTY: THUS, BY AGE SIXTY, HE WILL HAVE LOST APPROXIMATELY THIRTY-FIVE TO FORTY PERCENT. ALTHOUGH SUSTAINED EXERCISE FOR TWENTY TO THIRTY MINUTES, THREE TIMES PER WEEK AT SIXTY PERCENT OF MAXIMUM AEROBIC CAPACITY, CAN INCREASE AN INDIVIDUAL'S CAPACITY, THE MAXIMUM INCREASE IS TEN PERCENT. MOREOVER, INTERRUPTIONS IN TRAINING SUCH AS THOSE CAUSED BY ILLNESS RESULT IN A LOSS OF WHATEVER BENEFIT WAS GAINED BY EXERCISE.

THUS, AS INDIVIDUALS AGE, PHYSIOLOGICAL CHANGES AFFECT THEIR ABILITY TO PERFORM. THE BODY'S ABILITY TO MAKE EFFICIENT USE OF

OXYGEN DECLINES, WITH A RESULTING DECLINE IN PHYSICAL STAMINA. IN ADDITION, MUSCLE STRENGTH, AN ISOMETRIC FUNCTION, WHICH IS INVOLVED IN PUSHING, PULLING, AND CARRYING, DECLINES AS A PERSON AGES. THE AGING PROCESS ALSO AFFECTS AN INDIVIDUAL'S REACTION TIME, HEARING, AND VISION. THIS MANIFESTS ITSELF, FOR EXAMPLE, IN AN INDIVIDUAL'S INABILITY TO ADAPT TO SUDDEN CHANGES IN LIGHTING, SUCH AS THE GLARE FROM HEADLIGHTS.

CORONARY HEART DISEASE OFFERS ANOTHER POTENTIAL PROBLEM FOR OLDER LAW ENFORCEMENT OFFICERS. ALTHOUGH AGE DOES NOT CAUSE CORONARY HEART DISEASE, DATA REVEALS AN INCREASE IN THE NUMBER OF INITIAL DISCOVERIES OF CORONARY HEART DISEASE AS AGE INCREASES. THE AVERAGE NUMBER OF DISCOVERIES FOR THE GENERAL POPULATION FOR PERSONS THIRTY TO THIRTY-NINE IS FOUR PER THOUSAND. IT IS TEN PER THOUSAND BY AGE FIFTY AND TWENTY PER THOUSAND BY AGE SIXTY—A RATE FIVE TIMES HIGHER THAN THAT FOR PERSONS THIRTY TO THIRTY-NINE. LATENT CORONARY HEART DISEASE PRESENTS THE DANGER THAT, IN TIMES OF STRESS, SUCH AS SUDDEN EXERTION IN COLD WEATHER OR DURING A CONFRONTATION, AN OFFICER'S ADRENALINE RESPONSE MAY PUSH HIM INTO TOTAL BODY COLLAPSE FROM FATIGUE OR MAY CAUSE A HEART ATTACK.

THERE IS NO SINGLE TEST OR BATTERY OF TESTS THAT SAFELY MEASURES AN OFFICER'S ABILITY TO PERFORM HIS DUTIES AND THAT IDENTIFIES, WITH REASONABLE ACCURACY, THE PRESENCE OF CORONARY ARTERY DISEASE. LABORATORY TESTS CANNOT RECREATE SAFELY THE STRESSFUL, SOMETIMES LIFE-THREATENING, SITUATIONS IN WHICH LAW ENFORCEMENT OFFICERS WORK. OFFICERS WILL KNOW THAT A TEST CANNOT BE TRULY LIFE-THREATENING. SOME TESTS THAT MIGHT BE USED, SUCH AS PUSHING A CAR ON A VERY COLD DAY, CARRY UNACCEPTABLY HIGH RISKS OF PHYSICAL HARM TO THE OFFICERS BEING TESTED. PREPARATION OF THE INDIVIDUAL TO BE EXAMINED CAN ALSO AFFECT THE RELIABILITY OF TESTING. FOR EXAMPLE, PERSONS WHO TAKE THEIR BLOOD PRESSURE MEDICATION SHORTLY BEFORE AN EXAMINATION MAY SHOW A SATISFACTORY BLOOD PRESSURE LEVEL ON THE DAY OF THE EXAMINATION EVEN THOUGH THEY HAVE NOT BEEN TAKING THE MEDICATION REGULARLY.

IF DEPARTMENTS ARE DENIED THE RIGHT TO SET THEIR OWN AGE REQUIREMENTS, THERE WILL BE ECONOMIC COSTS. ALL GOVERNMENTAL BODIES PROVIDE PENSIONS FOR PUBLIC SAFETY OFFICERS WHO RETIRE, WITH INCREASED PENSIONS GOING TO OFFICERS DISABLED IN THE LINE OF DUTY.

KEEPING OFFICERS ON AFTER THEIR AGE HAS MADE IT MORE DIFFICULT AND HAZARDOUS FOR THEM TO PERFORM INCREASES THE CHANCE THAT THE OFFICER WILL BE INJURED WHILE ON DUTY. PHYSICAL TRAUMA THAT CAN BE ABSORBED BY YOUNGER OFFICERS MAY BE MAJOR PROBLEMS FOR OLDER OFFICERS. STATE AND LOCAL GOVERNMENTS, MANY OF WHICH ARE STRUGGLING TO REMAIN SOLVENT, CANNOT AFFORD TO BEAR THE EXTRA COST OF PAYING DISABILITY PENSIONS TO OFFICERS WHO SHOULD HAVE BEEN RETIRED EARLIER. SUPREME COURT JUSTICE POWELL WAS CORRECT WHEN HE WROTE IN HIS CONCURRENCE IN *E.E.O.C.* V. *WYOMING*: "I ALSO BELIEVE, CONTRARY TO THE POPULAR VIEW, THAT THE BURDENS IMPOSED ON THE NATIONAL ECONOMY BY LEGISLATIVE PROHIBITIONS AGAINST MANDATORY RETIREMENT ON ACCOUNT OF AGE EXCEED THE POTENTIAL BENEFITS."

IN THE EXPERIENCE OF A MAJORITY OF PUBLIC SAFETY AGENCIES, EARLY RETIREMENT IS VIEWED AS A POSITIVE REWARD AND IS INITIALLY AN INCENTIVE FOR EMPLOYMENT. AN EARLY RETIREMENT WITH A VERY FAVORABLE PENSION IS PERCEIVED BY NEW EMPLOYEES AS COMPENSATION FOR THE RIGORS AND DEMANDS OF THIS STRESSFUL OCCUPATION. AN OFFICER'S GROWTH IN AN ORGANIZATION AND HIS PLANS FOR THE FUTURE HINGE ON THE STABILITY OF RETIREMENT AT A PREDETERMINED POINT IN

HIS LIFE.

AS OFFICERS APPROACH THE AGE OF COMPULSORY RETIREMENT OR HAVE COMPLETED THE MAXIMUM NUMBER OF YEARS OF SERVICE, THEY BEGIN TO FEAR LEAVING THE SECURITY OF THE WORKPLACE THEY HAVE GONE TO FOR TWENTY-FIVE YEARS OR SO. EARLY RETIREMENT AND THE JOB OPPORTUNITIES MADE AVAILABLE BY IT, WHICH WERE ONCE ATTRACTIVE, LOSE THEIR APPEAL WHEN WEIGHED AGAINST THE UNCERTAINTY OF LEAVING. YET IT WAS PRECISELY THOSE THINGS THAT MADE THEIR CAREERS AS REWARDING AS THEY COULD BE.

IN VANCE V. BRADLEY, 440 U.S. 93 (1979), THE UNITED STATES SUPREME COURT UPHELD LEGISLATION WHICH PERMITTED FOREIGN SERVICE PERSONNEL TO BE RETIRED AT AGE 60. IT RECOGNIZED A LEGITIMATE AND SUBSTANTIAL GOVERNMENT INTEREST IN RECRUITING, TRAINING AND ASSURING THE PROFESSIONAL COMPETENCE, AS WELL AS THE MENTAL AND PHYSICAL RELIABILITY, OF THE CORPS OF PUBLIC SERVANTS WHO HOLD POSITIONS CRITICAL TO OUR FOREIGN RELATIONS. THIS INTEREST WAS FURTHERED BY THE COMPULSORY RETIREMENT OF EMPLOYEES, THE COURT HELD, BECAUSE IT CREATED PREDICTABLE PROMOTION OPPORTUNITIES AND THUS SPURRED MORALE AND STIMULATED SUPERIOR PERFORMANCE IN THE RANKS.

ANOTHER FACTOR THAT SHOULD BE CONSIDERED BY THIS SUBCOMMITTEE IS THE IMPACT ON MINORITY GROUPS AND WOMEN IF COMPULSORY RETIREMENT IS NOT PERMITTED. AFFIRMATIVE ACTION GOALS ESTABLISHED BY THE STATES WILL, TO SOME EXTENT, BE NULLIFIED. CURRENTLY, THE TYPICAL PUBLIC SAFETY PENSION PLAN MANDATES RETIREMENT AT AGE 55. IF OFFICERS MUST NOW BE RETAINED TO AGE 70, FEWER RETIREMENTS WILL OCCUR OVER THE NEXT FIFTEEN YEARS. WITH FEWER RETIREMENTS, A LAW ENFORCEMENT AGENCY'S AUTHORIZED STRENGTH WILL NOT BE DEPLETED TO THE POINT WHICH HAS HISTORICALLY ALLOWED FOR THE START OF SEVERAL RECRUIT CLASSES PER YEAR. IN ONE STATE LAW ENFORCEMENT AGENCY CURRENTLY OPERATING UNDER A CONSENT DECREE, RECRUIT TRAINING CLASSES ARE MADE UP OF AT LEAST 33 1/3 PERCENT MINORITIES AND WOMEN. CLEARLY, THE PROGRESS THAT HAS BEEN MADE IN THE AREA OF AFFIRMATIVE ACTION WILL COME TO A HALT. FURTHERMORE, THOSE MINORITIES AND WOMEN WHO ARE ALREADY IN PLACE IN A PUBLIC SAFETY ORGANIZATION WILL BE DENIED THE OPPORTUNITY TO ADVANCE TO POSITIONS OF HIGHER RESPONSIBILITY, SINCE FEWER SUCH POSITIONS WILL BE AVAILABLE.

IN LIGHT OF THE ABOVE-STATED FACTS, THE IACP URGES CONGRESS TO PASS LEGISLATION EXEMPTING STATE AND LOCAL LAW ENFORCEMENT AGENCIES FROM THE RESTRICTIONS OF THE ADEA. ONLY WITH SUCH AN EXEMPTION WILL WE BE ABLE TO CONTINUE TO PROVIDE OUR NATION'S CITIZENRY WITH THE MOST QUALIFIED INDIVIDUALS TO FULFILL THE MISSION OF GUARDING THE PUBLIC SAFETY.

THANK YOU FOR GIVING OUR VIEWS YOUR CONSIDERATION.

Senator NICKLES. Thank you very much, Mr. Summers. We appreciate your comments.

Mr. Bellumo

Chief BELLUMO. My position is deputy chief in the Baltimore City Fire Department, representing the International Association of Fire Chiefs. I am here to testify on the need to amend the Age Discrimination in Employment Act. As you are well aware, this matter is not only important to the American fire service, but to the citizens we serve because the fire service protects the public against threats of fire, medical emergencies and other hazards requiring emergency response.

Mr. Chairman, the International Association of Fire Chiefs, representing this Nation's chief fire officers, is here to speak for those fire chiefs who are charged with managing this Nation's first line of defense against fires, medical emergencies, floods, earthquakes, hazardous materials emergencies, and an endless number of manmade and natural disasters. The activities conducted by individual fire departments and the resources available to them vary as widely as the communities they serve.

The expected standard of fire and life safety protection delivered by the fire service depends on having active, capable, well trained and experienced personnel. The occupational demands and requirements of fire service personnel vary widely, depending on the responsibilities of the local fire department. Nevertheless, many of the basic, most essential tasks that we are called upon to perform necessitate physical capabilities that current research indicates decline with age.

Consequently, it is the IAFC's opinion that the safety of the public can be ensured best when State and local governments have the ready ability to control the hiring and retirement policies for their own public safety personnel.

We feel that State and local governments are best able to assess their own needs and requirements in order to provide these basic services. In addition, along with professional and judicial protections, the ADEA still should guard against the age discrimination that it was designed to control.

Among other occupational requirements, firefighting is vigorous and physically demanding, requiring much stamina, agility and strength. The public safety would be endangered if personnel could not perform as required. One never knows the circumstances of an emergency, or what one may be required to do. This can range from carrying a fire victim out of a burning house to withstanding the long, agonizing hours necessary to suppress a major fire.

Also, consider the term emergency response—the key to the delivery of fire and life safety protection. A fire department typically responds to a call within 5 minutes of notification of an emergency. The immediate response to a piercing siren or bell requires speed and agility, as well as the ability to cope with the stress of rushing to an unknown destination.

The difference between the occupational qualifications of public safety personnel and most other occupations is the requirement for sufficient aerobic capacity so that these workers can continue to exert themselves strenuously at high work rates.

Most authorities agree that aerobic capacity declines progressively for the average individual after the age of 20. Decreased aerobic capacity results in increased oxygen debt, which can contribute to reduced stamina and concentration, and an increased risk of heart failure. We cannot allow this to happen. Not only is the public at risk, but so is the firefighter.

Does the fire service require exemption from the age limitation set by the ADEA because of unique occupational requirements? Our opinion is yes. Additionally, upon reviewing the amendment proposals being considered in the House and Senate, we ask that this subcommittee take a second look at how a "firefighter" is defined. We suggest that the current definition is incomplete.

S. 698 and H.R. 1435 define firefighter as "an employee the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position."

This definition, Mr. Chairman, does not take into account the range of activities conducted by the majority of fire departments in this country. Therefore, it excludes fire personnel who are involved in emergency medical services, arson investigation, hazardous materials incidents, code enforcement and emergency management. All of these activities are equally, if not more, aerobically demanding and need to be included within any amendment to exempt State and local government organizations from the limitations established by the ADEA.

We would like to offer a revision to the definition of firefighter: The term "fire service officer" means "an employee, the duties of whose position are primarily to perform work directly connected with life safety activities, which includes the prevention, control and suppression of fires, the maintenance and use of firefighting apparatus and equipment, emergency medical services, and emergency and/or disaster response."

Another argument against the current status is the cost and burden of appealing the age limitations set by the ADEA on an individual basis, as you noted earlier, Senator. In this era of decreasing revenues available to State and local governments, it is important to streamline, as much as possible, regulations that can divert resources from the cost-effective delivery of public safety services. This is particularly important for the smaller communities and rural areas that, even in the best of times, have difficulty funding the fire departments that they need.

In summary, Mr. Chairman, the IAFC supports the amendments under consideration to exempt State and local fire service and law enforcement organizations from the ADEA with the new definition of firefighter that we have suggested.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bellumo follows:]

INTERNATIONAL ASSOCIATION OF FIRE CHIEFS • INCORPORATED

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833-3420

TESTIMONY OF

DEPUTY CHIEF ROBERT BELLUMO
BALTIMORE CITY (MD) FIRE DEPARTMENT

FOR THE

INTERNATIONAL ASSOCIATION OF FIRE CHIEFS

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

AGE DISCRIMINATION IN EMPLOYMENT ACT
PUBLIC SAFETY OFFICERS AMENDMENT

MARCH 18, 1986

Mr. Chairman, I want to take this opportunity to thank you for inviting me, as a representative of the International Association of Fire Chiefs, to testify on the need to amend the Age Discrimination in Employment Act (ADEA). This matter is not only important to the American fire service, but to the citizens we serve because the fire service protects the public against threats of fire, medical emergencies and other hazards requiring emergency response.

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Consequently, it is the IAFC's opinion that the safety of the public can be ensured best when state and local governments have the ready ability to control the hiring and retirement policies for their own public safety personnel. We feel that state and local governments are best able to assess their own needs and requirements in order to provide these basic services. In addition, along with professional and judicial protections, the ADEA should guard still against the age discrimination that it was designed to control.

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Does the fire service require exemption from the age limitations set by the ADEA because of unique occupational requirements? Our opinion is yes. Additionally, upon reviewing the amendment proposals being considered in the House and Senate, we would ask that this subcommittee take a second look at how a "fire fighter" is defined. We suggest that the current definition is incomplete.

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In summary, Mr. Chairman, the IAFC supports the amendments under consideration to exempt state and local fire service and law enforcement organizations from the ADEA with the new definition of fire fighter that we have suggested.

Senator **Nickles**. Thank you very much, and to all of our panelists, we appreciate your testimony.

Would most of the members of the FOP or the fire fighters association support this legislation? Do you have some kind of a feeling for that?

Mr. **Cahill**. Mr. Chairman, let me address that for law enforcement and say that in my position as a street police officer right now, I have discussed this with members all over the State of Virginia and every single one of them that I have talked with is in total support of this legislation. I have talked with members from other States. As a matter of fact, we have members here from Indiana and Georgia, and they are in total support of this legislation also. I have not talked with anybody in law enforcement that is not in support of this legislation.

Mr. **Schaitberger**. Although there are exceptions to every rule, and with 170,000 members I know that we have individuals who would personally feel that they would not agree with this. Without exception, overwhelmingly, our organization membership and leadership support the concept of exemption.

Senator **Nickles**. You feel that a pretty strong majority——

Mr. **Schaitberger**. Without any question, overwhelmingly a majority, with just the exception to the rule as I noted.

Senator **Nickles**. Mr. Bellumo, I think there was a Supreme Court decision with Baltimore this year, is that not correct?

Chief **Bellumo**. That is correct.

Senator **Nickles**. Do you have an idea how much that cost the city of Baltimore to take the case all the way to the Supreme Court?

Chief **Bellumo**. Mr. Chairman, it cost us $250,000, the last estimate.

Senator **Nickles**. To take that case all the way to the Supreme Court, and you end up losing that case, is that correct?

Chief **Bellumo**. That is correct.

Senator **Nickles**. And was that just this year or last year, in 1985.

Chief **Bellumo**. Yes. Mr. Chairman, we are paying for that in some way, and I will not take up your time but we are having some large fires in Baltimore City. I had a sixalarm fire last Wednesday night and I visited the hospitals after these fires occurred and the eight individuals I went to look at, I feel that a number of them should have been avoided incidents. What we are talking about is the age factor on the firegrounds, I think that hurts us, I really do. We do not want 67- or 68-year-old individuals working on these incidents because we are going to be carrying them away, rather than them walking away from them.

You asked about support. Fire chiefs are in complete support. The city of Baltimore would like to have the latitude to retire the individuals. Our pension system was aimed at a lower age. We are paying for it financially in the city of Baltimore, as we are holding onto our people longer. Our pension system is rated for certain lower ages and now we have to go a little further with it.

But just looking at it from a suppression point of view, I am a suppression officer and I do not want individuals who are susceptible to injury to be on the incidents that I am in command of.

Senator **Nickles**. You mention the retirement system is targeted toward the earlier retirement age, 55 or whatever.

Chief **Bellumo**. Yes.

Senator **Nickles**. A lot of those incentives are such that there will be a certain percentage per year, 2 percent per year of service or 2.5 or whatever it might be?

Chief **Bellumo**. That is correct.

Senator **Nickles**. Let us say there is 2.5 percent per year of service, maximum of 20 or maximum of 30 or whatever you might come up with, or 2 percent maximum at 30, that would be 60 percent. If you took the maximum retirement age out you would have a great financial incentive for an individual to say, well, I think even though I would like to retire, was planning on retiring, now they cannot make me retire; therefore, I think I will stay on, thinking it would help his retirement, and possibly it would at the retirement level, but he might be taking some chances and jeopardizing his life and possibly the life of his fellow firemen or policemen. Is that correct or not?

Chief **Bellumo**. That is correct, with our pension system. I am being repetitive, but our system is predicated on individuals going out at a younger age, and when they stay for a longer term, then the city has to absorb that loss in the process. But it was predicated on an early age because we considered this to be a hazardous occupation that required a younger man and therefore we lowered the pension requirements, age requirements. It is a completely different system than any other city worker in Baltimore, police and fire. They come under an individual system because it is a hazardous occupation. Now we have changed the rules and we are raising the age that they can stay in, so we are defeating the purpose of the system.

Senator **Nickles**. Mr. Schaitberger?

Mr. **Schaitberger**. I would like to, Mr. Chairman, focus your attention to the front end of the age question and that is the hiring end and which we believe will really result in one of two unfortunate results, and that is actuarially make pension plans within public safety totally unaffordable by municipal government and the employee, or it will increase the overall age of the departments to a substantial point.

What will simply happen is, as you begin bringing in older individuals on the front end, the cost of those retirement plans will actuarially be increased astronomically, so that either the city will have a choice of coming up with substantial sums of money to fund those plans or, as we believe the case will be, they will not fund those plans so that the plans will then be extending their retirement age benefits and then forcing the entire force to stay on for longer periods of time, and what will happen is you will have a shift of the average age of the entire work force up to substantial proportions.

Senator **Nickles**. Could you also have the situation where to be actuarially sound you would have to make those changes? Politically it would not be popular to do so. Those decisions would be put off and you would have a situation where the pension fund would be grossly underfunded until you reach a crisis point.

Mr. SCHAITBERGER. Unfortunately, I guess in your business that oftentimes happens and that is that decisions to maintain the benefits or provide better benefits are made without the decision to fund those benefits 20, 30, and 40 years down the road.

Senator NICKLES. I would think that would happen time and time again and you would end up not making those changes until you get a crisis situation. That would not affect somebody this year or next year, but 20 years down the road you are going to have a real serious problem.

Some jurisdictions, and I am thinking possibly of Los Angeles, have age 65 for their police and fire. Is anybody familiar with that?

Mr. SCHAITBERGER. I believe they have changed and moved their's upward from what it previously was at one point in time, which was–I think it has been moved to 65.

Senator NICKLES. I would be interested if you would provide for the committee how many or what percentage of those individuals are working beyond their previous retirement age, 55. This would enable us to find out really what kind of problem or potential problem we are having. It may be that 90 percent of the individuals would go ahead and retire as planned. The information does not have to cover just L.A. In those jurisdictions that have lifted the cap or have the higher cap, age 65 or 70, how is it working? What percentage is going to the higher retirement age and if they have had higher incidences of health problems, et cetera, for those individuals.

Thank you very much. We appreciate your participation today.

The next panel includes Mark Levitt, representing the National Public Employer Labor Relations Association; Max Chiddister, mayor of Goshen, IN, representing the Indiana Association of Cities & Towns; Ronald Butler, deputy attorney general, representing the National Association of Attorneys General; and Col. Clinton Pagano, superintendent of New Jersey State Police, representing the New Jersey State Police.

Mr. Levitt?

STATEMENT OF MARK H. LEVITT, DEPUTY DIRECTOR, OFFICE OF LABOR RELATIONS, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION; MAX B. CHIDDISTER, MAYOR, GOSHEN, IN, INDIANA ASSOCIATION OF CITIES AND TOWNS; RONALD D. BUCKLER, DEPUTY ATTORNEY GENERAL, STATE OF INDIANA, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; AND COL. CLINTON L. PAGANO, SUPERINTENDENT, NEW JERSEY STATE POLICE

Mr. LEVITT. Thank you, Mr. Chairman. I appreciate the opportunity to appear before this distinguished subcommittee.

I am deputy director of the Office of Labor Relations and Collective Bargaining for the District of Columbia government, and the testimony and opinions I am about to give are my own on behalf of the National Public Employer Labor Relations Association.

NPELRA is a professional management association representing approximately 2,000 public sector labor relations and employee relations personnel and other related professionals across the country. Daily these individuals are involved in the development, implementation, maintenance, and revision of personnel policies and practices that have the potential to affect the terms and conditions of employment of over 10 million Government workers.

NPELRA members have been concerned about the ever increasing litigation surrounding mandatory hiring and retirement age limits, and the potential impact this litigation has on other aspects of the employment relationship, namely, pensions, increases in workers' compensation liability, and other employer costs that the taxpayers ultimately must bear in the absence of any clear delineation of Federal intent.

NPELRA has been monitoring activity in this area for the last 3 years in response to the increasing concern expressed by its membership. Two issues form the basis of their concerns. One is the existence of an exemption for certain Federal sector occupations—law enforcement and firefighters. The other issue is the increasing number of challenges to the mandatory hiring and retirement age limits maintained for many years by police and fire departments, and correctional facilities in States and municipaliaties across the country.

The occupations which provide the greatest source of security in our society, those involving public safety, also have experienced the most litigation, primarily due to the prevalence of mandatory hiring and retirement age limits.

Age limits for public safety employees may be based on several factors, including tradition, scientific, medical, and actuarial data, collective bargaining provisions, State law, safety, and other considerations. State laws mandating hiring and retirement age limits combined with concerns for the solvency of pension funds for police officers and firefighters is perhaps the single biggest source of concern and confusion, given the Federal exemptions for these same classes of employees.

All employers and in particular those in the public sector should lead by example when acting reasonably and responsibly to exclude or terminate individuals from employment based on age. The members of NPELRA would like to see some clarification of whether Congress intended that two standards exist in this country with respect to the employment and retention of public safety employees.

No study has indicated that there is a substantial or significant enough difference in employment at the Federal, State, and local levels to warrant this distinction and dual standard. Federal employees engaged in certain public safety occupations are exempt by law, and State and local public safety employees are not. It is as simple as that.

Clarifying this distinction will reduce the uncertainty and continual threat of litigation. Public employers would still be required to justify reasonable approaches to the establishment of mandatory hiring and retirement age limits. NPELRA is simply requesting some relief for public safety occupations be considered to stem the tide of litigation and confusion surrounding this issue.

What would seem appropriate at this point is to resolve the question of the dual standard including Federal and State and all other public safety personnel at the State and local levels. NPELRA would recommend an immediate exemption consistent with the Federal standard until a national study is conducted which explores safety and physical standards in relationship to age. This could then be the basis of a valid determination regarding all mandatory age limits.

Mr. Chairman, our membership is comprised of a mixed bag of sorts. Some NPELRA members have indicated their jurisdictions have abandoned mandatory hiring and retirement age limits and test solely on ability and fitness to perform the work. Other jurisdictions have existing age limitations and have all their pension related actuarial funding assumptions inextricably tied to these age limitations.

Accordingly, abandoning mandatory retirement limits may have merit but won't work for every jurisdiction immediately. The elimination of age limitations has implications that are far reaching, that disturb pension funding and the funds' actuarial soundness.

Also, to eliminate any mandatory hiring and retirement age limits right now through legislation or through litigation has the potential to be chaotic and fiscally imprudent. What is needed is a two-step or phased-in approach that (1) allows for Congress to more clearly articulate its intent in granting exemptions to public safety Federal employees, and (2) consider what, if any, standards or exemptions ought to exist with respect to mandatory hiring and retirement age limits.

We would ask the Congress to eliminate the necessity of protracted litigation to resolve the issue involving dual standards for the Federal and all other governmental levels of public safety employment. Tremendous amounts of money have been spent on the costs of defending mandatory hiring and retirement age limits, without any rational basis for the distinction between Federal, State, and local government employees.

Perhaps even a congressionally mandated study to determine the future of age limitations in hiring and retention for police, fire, corrections, and other related public employee classifications, such as paramedics that do have ancillary physical job requirements, would go a long way in negating these massive on-going costs and for the first time provide for a uniform and rational basis for imposition or potentially the elimination of the BFOQ age requirements.

When courts across the country have been required to assist the validity of age-based mandatory hiring and retirement statutes or policies, they have come to totally opposite conclusions. It is not practical to have a myriad of decisionmaking bodies. This premise was adopted by the second circuit court of New York in *Hahn* v. *Buffalo*, where they also said it seems somewhat anomalous for the lawfulness of maximum age limitations on police hiring to depend on particular evidence presented at various court trials throughout the country.

In summary, we ask that this committee consider the testimony of NPELRA and request that Congress clarify its intent with respect to the dual standard of age requirements for public safety jobs in this country. The public sector at the State and local levels feel that Congress has the opportunity, given the Supreme Court's recent decision in *EEOC* v. *Baltimore* and the *Hahn* v. *Buffalo* case, to provide a timely response to an issue that can only become the subject of further litigation, expense and confusion to the professionals that work in this field.

We appreciate the opportunity to appear before the subcommittee and we look forward to the results of your deliberations.

Thank you.

[The prepared statement of Mr. Levitt follows:]

NATIONAL PUBLIC EMPLOYER
LABOR RELATIONS ASSOCIATION
1620 Eye Street, N.W. • Fourth Floor • Washington, D.C. 20006 • (202) 296-2230

Statement By

MARK H. LEVITT
Deputy Director, Office of Labor Relations
of the District of Columbia

On Behalf Of The

National Public Employer Labor Relations Association (NPELRA)

Before The

Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate

March 18, 1986

Mr. Chairman and members of the subcommittee, my name is Mark Levitt, Deputy Director, Office of Labor Relations for the District of Columbia. The testimony that I am about to give is on behalf of the National Public Employer Labor Relations Association (NPELRA). NPELRA is a volunteer professional management association which represents approximately 2,000 public sector labor and employee relations, personnel, and other professionals across the country. Daily these individuals are involved in the development, implementation, maintenance, and revision of personnel policies and practices including the establishment and utilization of recruitment, examination, and selection devices that have the potential to affect the terms and conditions of employment of over ten million government workers. NPELRA members have been concerned about the ever increasing litigation surrounding mandatory hiring and retirement age limits, and the potential impact this litigation has on other aspects of the employment relationship; namely, pensions, increases in workers compensation liability, and other employer costs that the taxpayers ultimately must bear in the absence of any clear delineation of federal intent.

NPELRA has been monitoring activity in this area on behalf of its members for the last three years in response to the increasing concern expressed by the membership. Two issues form the basis of their concerns. One issue is the existence of an exemption for certain federal sector occupations related to public safety. The other issue is the increasing number of challenges to mandatory hiring and retirement age limits maintained for many years by police, fire departments, and correctional or detention facilities.

The occupations which provide the greatest source of security in our society, those involving public safety employees, also has experienced the most litigation, primarily due to the prevalence of mandatory hiring and retirement age limits in this area. Age limits for public safety employees may be based on several factors including tradition, scientific, medical, and actuarial data, collective bargaining, state law, safety, and other considerations. State laws mandating hiring and retirement age limits combined with concerns for the solvency of pension funds for police officers and firefighters is perhaps the most single biggest source of concern and confusion given the federal exemptions for many federal public safety occupations.

All employers and in particular those in the public sector, should lead by example when acting reasonably and responsibly to exclude or terminate individuals from employment based on age. The members of NPELRA would like to see some clarification of whether Congress intended that two standards exist in this country with respect to the employment and retention of public safety employees. No study has indicated such a substantial and significant enough difference in employment at the federal, state, and local levels to continue the distinction between public safety employees. Federal employees engaged in certain public safety occupations are exempt by law, state and local public safety employees are not. Clarifying this distinction will reduce the uncertainty and continual threat of litigation. Public employers would still be required to justify reasonable approaches to the establishment of mandatory hiring and retirement age limits. We are simply requesting that some relief for public safety occupations be considered to stem the tide of litigation and confusion surrounding this issue.

What would seem appropriate at this point is to resolve the question of the dual standard including federal and all other public safety personnel. NPELRA would recommend an immediate exemption consistent with the federal standard which might lead to the eventual elimination of all mandatory age limits based on a valid study, once the impact on retirement and other organizational and social policies can be determined. A suggested approach might be to provide immediate relief to employers of public safety functions with potential eventual elimination of all mandatory age limits once the impact on retirement and other organizational and social policies can be determined.

Some NPELRA members have indicated their jurisdictions have abandoned mandatory hiring and retirement age limits and therefore, test solely on ability and fitness to perform the work. This approach to the issue has merit but won't work for every jurisdiction immediately. The elimination of age limits automatically has implications for state and local governments that base pension funding and actuarial soundness on the affect of mandatory hiring and retirement age limits. To eliminate any mandatory hiring and retirement age limits right away would be as chaotic as the dual standards that currently exist. What is needed is a two step or phased in approach that 1) allows for Congress to more clearly articulate their intent in granting exemptions to federal employees who are engaged in work involving the same relative skill, effort, and responsibility and performed under working conditions similar to that of state and local government employees, and 2) consider what, if any, standards or exemptions ought to exist with respect to mandatory hiring and retirement age limits. We feel the simplest approach is for Congress to grant flexibility to state and local governments to determine what standards should exist for their jurisdictions.

We would ask that Congress eliminate the necessity of protracted litigation to resolve the issue involving dual standards for the federal and all other levels of public safety employment. Tremendous amounts of money have been spent on the costs of defending mandatory hiring and retirement age limits by medical, scientific, and other evidence without any rational basis for the distinction between federal, state, and local government employees. A study on age limitations in hiring and retention for police, fire, corrections and other related public employee classifications such as paramedics that do have ancillary physical job requirements would go a long way in negating these massive ongoing costs, and for the first time provide for a uniform and rational basis for imposing or elimination of BFOQ age requirement.

In summary, we ask that this subcommittee consider the testimony given on behalf of NPELRA members in clarifying its intent by providing for a dual standard with respect to public safety functions in this country. The public sector at the state and local levels feel that Congress has the opportunity given the Supreme Court's recent pronouncement in the EEOC v. Baltimore case to provide a timely response to an issue that can only become more litigious and confusing to the professionals who work in this field. We appreciate the opportunity to appear before this subcommittee and look forward to the results of your deliberation.

1984
NEW ENGLAND REGIONAL
NPELRA CONFERENCE

September 30 - October 3, 1984
The Sonesta Hotel
Portland, Maine

Public Safety Issues of the '80s

Michael J. Wieloszynski
Labor Contracts Officer
Greenwich, Connecticut
Wednesday, October 3

I. The Age Discrimination in Employment Act (ADEA) and Public Safety Employment

The 1984 amendments to the Fair Labor Standards Act included extension of the ADEA to the public sector. Although NLC v Usery struck down application of the wage and hour provisions of the FLSA to state and local government, the Supreme Court ruled in EEOC v. Wyoming (79 L Ed 2nd 18, 1983) that the application of ADEA to state and local government is constitutional.

The ADEA prohibits discrimination in employment against persons on the basis of age and applies to individuals who are at least forty years of age but less than seventy. Employers may, however, make exemption where "...age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business..." [29 U.S.C. 623 (f)(1)] The general standard in establishing such a BFOQ has been for the employer to show that the age qualification is reasonably related to the essential operation of its business and that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job or that it is impossible or impracticable to determine job fitness on an individualized basis.

Other pertinent cases on the issue of age, specifically related to police and fire employment and retirement:

EEOC v County of Allegheny, 705 F. 2nd 679 (1983): The U.S. Court of Appeals for the Third Circuit struck down County's refusal to consider any applicant for the position of police officer who was over the age of 35. Allegheny County would not accept applications from individuals who were over the age of 35--action which was in conformance with a State statute in Pennsylvania requiring the candidates for police officer be between the ages of 18 and 35. The Court held

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that a state statute that conflicts with Federal law cannot insulate an employer from liability for employment discrimination. The County did not show that the age limitation was a bona fide occupational qualification.

EEOC v. University of Texas Health Science Center at San Antonio, 710 F. 2nd 1091 (1983): The U.S. Court of Appeals for the Fifth Circuit upheld a district court ruling that the University's age 45 limit for the hiring of individuals as campus policemen was a BFOQ. The Court dismissed EEOC's argument that the policy of allowing officers hired before the age of 45 to work beyond their 45th birthdays proved that the age restriction wasn't a BFOQ. The Court stated: "The fact that previously hired employees are allowed to work past the initial hiring age does not by itself defeat a BFOQ. Were we to accept [EEOC's] argument, the hiring ceiling would always have to coincide with the mandatory retirement age for any particular job."

Mahoney v. Trabucco, CA 1, Docket No. 83-1862, Decided July 2, 1984: This recent decision of the Court of Appeals for the First Circuit reversed a district court decision which had found a mandatory retirement age of 50 for State Police in Massachusetts to violate the ADEA. The officer who brought the suit had been assigned to a routine desk job for the last 14 years of his employment. The district court had held that, even though the officer could be called upon for vigorous duty, his day-to-day duties were as an office worker; that it was unlikely that he would be called upon for the vigorous type of work; and that the State could not force him to retire as long as he continued to work at his current assignment. The district court reached this conclusion by defining the "duties of the job" to mean the particular assignment of the officer rather than the occupational duties of a State Police Officer generally.

The Court of Appeals held that it was the occupational category of State Police Officer rather than the particular assignment within that category which should govern and reversed the lower court thereby upholding the mandatory retirement age of 50 for State Police in Massachusetts.

Johnson v. Mayor and City Council of Baltimore, 731 F. 2nd 209 (1984): Like the Mahoney case, the Court of Appeals (in this instance, for the Fourth Circuit) reversed a district court judgement which had held that Baltimore's mandatory retirement age of 55 violated ADEA. In this case, however, the position of firefighter was involved and the court held: "...we must initiate a search for a 'reasonable federal standard' by which to test whether age is a bona fide occupational qualification for the City of Baltimore's firefighters. Congress has, however, made the search a simple one. With respect to federal firefighters, Congress has provided the standard." Pointing out that Congress exempted federal law enforcement officers and federal firefighters

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from ADEA by mandating such employees retirement at age 55, the court stated: "Where Congress itself has deemed age to be a bona fide occupational qualification for federal firefighters, we perceive no justification for ignoring the Congressional mandate in ascertaining 'a reasonable federal standard' by which to measure firefighting in the City of Baltimore."

Orzel v. City of Wauwatosa Fire Department, 697 F. 2nd 743 (1983): In this case concerning a firefighter who had been promoted to the position of Assistant Fire Chief in 1970, the Court of Appeals for the Seventh Circuit upheld the District Court's ruling which struck down Wauwatosa's mandatory retirement age of 55 for firefighters. The court specifically rejected the City's argument that its age 55 limit was justified because of the Federal firefighters' mandatory 55 retirement. The court stated that the federal limit could not automatically be applied to "...a wholly different group of employees, operating under different working conditions, and performing significantly different job functions."

Bills have been introduced in both houses of Congress to amend the ADEA by exempting certain occupations from coverage. The Senate bill (s. 2425) introduced by Senator Wendell Ford (D-Kentucky) would exempt law enforcement officers. The House version (H.R. 5310) would permit state and local jurisdictions to set mandatory retirement ages for public safety officers, including police and firefighters.

As made reference to in the Johnson and Orzel cases above, the Federal government has exempted Federal law enforcement officer and firefighters by mandating retirement of both at age 55. The provision [5 U.S.C. 8335(b)] does allow for exemption by the head of the agency "...when in his judgement the public interest so requires..." until the employee reaches the age of 60. The Johnson (Fourth Circuit) and Orzel (Seventh Circuit) cases are in conflict with respect to reliance on these Federal exemptions in local government cases. The U.S. Supreme Court denied certiorari to the Orzel case. Whether or not certiorari will be sought in the Johnson case is not known as of this writing.

II. Heart, Hypertension, Lung Disease and Physical Fitness of Police and Firefighters

A majority of the 50 states have what are commonly referred to as heart and lung or heart and hypertension statutes covering police and or firefighters. These are usually automatically presumed to be job related conditions qualifying the employee for disability retirement. Only in two are three states is the presumption rebuttable.

A recent move is being seen for including certain types of cancer in such statutes as well. The State of Illinois last year passed the first presumptive cancer bill. Any type of cancer known to be caused by heat, radiation, or a known carcinogen as defined by the International Agency for Research on Cancer is now presumed to be job related for firefighters in Illinois.

California will treat cancer as job related, however, the fact is not presumptive. The firefighter must be able to prove that his cancer is a direct result of exposure to a specific toxic chemical.

Plastics used in building construction which, when burned, create carcinogenic fumes, is attributed for rising rates of cancer in firefighters. The Chicago Firefighters Union Local 2 conducted a survey which purports to show that the rate of cancer deaths among firefighters is 40% versus the national average of 22%. The International Association of Firefighters has data suggesting a rate of 396-38% of firefighter deaths attributable to cancer. It is anticipated that increasing efforts will be made to add cancer to presumptive heart/lung/hypertension statutes.

Such statutes and the concerns and potential liability which they entail for jurisdictions notwithstanding, virtually all jurisdictions require comprehensive physical as well as strength and agility exams of all firefighter and police officer candidates. Yet how many jurisdictions require firefighters or police officers to maintain the standards of the physical or strength and agility throughout the employees course of employment?

Jurisdictions are beginning to pay attention to this dichotomy and are making efforts to address it. In some instances unilaterally and in some instances at the bargaining table.

No Smoking Rules:

Several jurisdictions have instituted no smoking rules for both police and firefighters, however, very few have done so at the bargaining table.

In the State of Virginia, which does not have a public sector bargaining statute, several jurisdictions have imposed no smoking rules. Arlington, Virginia, imposed a no smoking rule in 1981, and Alexandria, Virginia, imposed one for both police and fire in 1979. Fairfax County, Virginia, initiated a rule in March, 1984, which prohibits any new hires as police officers, firefighters, or deputy sheriffs from smoking. New Hires are required to sign an affidavit swearing that they are non-smokers and shall remain non-smokers.

Salem, Oregon, adopted a rule in March, 1983, which prohibits smoking on and off the job for all newly hired firefighters. Eugene, Oregon, has a similar prohibition as does San Mateo, California.

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In Aberdeen, South Dakota, current negotiations between the City and I.A.F.F. Local 446 involve a no smoking issue. As of August 20, 1984, the Local had agreed to the ban for new hires but was resisting application of the ban to current employees.

Mr. Terry O'Keefe (605-225-5420) indicated that the City is going to insist upon some language in the new contract which will apply to all employees. It is possible that there will be a complete ban for new hires but only an on-the-job ban for current employees.

South Dakota has a presumptive Heat/hypertension law for firefighters. The state's bargaining statute provides for mediation by the State Department of Labor, however, the employer may ultimately impose a settlement.

Physical Fitness

Negotiating some form of continued physical fitness standards is becoming increasingly popular--at least as far as employers are concerned. Both police and fire bargaining units do not usually embrace the concept--particularly when the issue arises as to what kind of action is to be taken regarding the employee who fails to comply with whatever standards are to be established.

Plans which have been adopted in some jurisdictions range from the simple height and weight charts with a simple good faith obligation to comply (example attachment 1) to some rather detailed and complex annual tests with dollar incentives attached and some loss of privileges up to possible termination.

An example of the later is the physical performance program adopted by the California Highway Patrol negotiated with the California Association of Highway Patrol Officers this year. Attachment 2 is the contractual language relative to the program. The program itself is described in a 126 page document titled Physical Performance Program HPM 70.9 and a companion booklet of 53 pages titled Physical Fitness for the Highway Patrol Officer HPG 70.25.

Negotiating physical fitness is sort of like negotiating morality. It is as difficult to be on the side of sin as it is to be against physical fitness. Unions, however, though perhaps in favor of fitness, are loath to agree to termination of the unfit. Employers too often make the mistake of believing that they have to negotiate termination. That is not the case. It may be possible to finesse the discharge issue particularly if the labor agreement has a just cause provision. The astute bargaining unit will be well aware that, if they agree that some standard must be complied with, then the employer will implicitly have the right to take appropriate action for failure to comply. The employer can clearly argue that failure to comply with a requirement is just cause for disciplinary action, including

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termination. The issue then becomes simply one of whether or not there was just cause.

I have not been able to find any cases on point. However, if the standards are the same as those required of new hires--that is, if a candidate for the position must meet the standards in order to be determined qualified for the job--then it would reasonably follow that the current employee who does not meet the same standard would not be qualified for the job either.

Of course, one of the obvious problems likely to be encountered in this uncharted area is the fact that the requirement of compliance with the standards once employed have not been applied in the past even though they were always in effect in order to be determined qualified for initial employment. This historical dichotomy is one which is likely to cause problems as employers attempt to enforce physical fitness standards. Yet it is a problem which the atmosphere of the times is probably more favorable for addressing than it ever has been.

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ATTACHMENT 1

Language from 1984-86 labor agreement
between the Town of Greenwich, CT, and
I.A.F.F. Local 1042:

ARTICLE XVII: PHYSICAL FITNESS

A. Recognizing that the physical fitness of a Firefighter is critical to his own health and safety as well as that of his fellow Firefighters and to the citizens they serve, the Town and Association shall cooperate in efforts to maintain the physical fitness of all employees covered under the terms of this Agreement.

B. The Town shall provide for each employee a complete physical examination, to include upon the recommendation of the physician a heart stress test, not less often then once in each twenty-four (24) month period.

C. All employees shall make a good faith effort to comply with the guidelines of the height/weight chart of Appendix II. The Town shall assist Firefighters who fall outside of these guidelines with advice regarding physical fitness programs and/or dietary programs to aid in their efforts to comply with these guidelines consistent with sound medical advice and the employee's individual physical characteristics.

D. The Town shall expend up to a maximum of $6,400 during the term of this Agreement for the purpose of providing physical fitness equipment and/or for making other physical fitness facilities available to employees. Via the labor/management committee of Article XXIII, K, the Association shall cooperate with the Town in reaching its determinations regarding expenditure of these funds.

APPENDIX II

HEIGHT, WEIGHT AND BODY BUILD

Male Firefighters

HEIGHT (Inches) *	WEIGHT (Pounds) **	
	MINIMUM	MAXIMUM
60	106	141
61	109	145
62	112	148
63	115	151
64	118	155
65	121	160
66	124	164
67	128	169
68	132	178
69	136	182
70	140	187
71	144	193
72	148	199
73	152	205
74	156	214
75	160	220
76	164	228
77	168	235
78	172	243
79	176	251
80	180	258

* Individual No Shoes
** Weight Without Clothes

NOTE: A body fat measurement of 20% or less will pass a candidate even if he exceeds maximum weight

HEIGHT, WEIGHT AND BODY BUILD

Female Firefighters

HEIGHT (Inches) *	WEIGHT (Pounds) **	
	MINIMUM	MAXIMUM
58	92	123
59	94	126
60	96	132
61	99	135
62	102	138
63	105	141
64	108	145
65	111	149
66	114	153
67	118	158
68	122	162
69	126	166
70	130	171
71	134	176
72	138	182

* Individual No Shoes
** Weight Without Clothes

NOTE: A body fat measurement of 25% or less will pass a candidate even if she exceeds maximum weight

ATTACHMENT 2

Language from the 1984-87 labor agreement
between the State of California and
California Association of Highway Police:

ARTICLE XII

PHYSICAL PERFORMANCE PROGRAM

35. Physical Performance Program

A. Introduction

The CAHP accepts the concept of a mandatory Physical Performance Program (PPP) as described in the Physical Performance Program Manual, HPM 70.9.

B. Program Objectives

1. To maintain physical fitness of all State Traffic Officers.

2. To establish minimum physical fitness standards for State Traffic Officers appointed on or after January 1, 1984, and for successful completion of Cadet Training.

C. Physical Performance Differential

State Traffic Officers with 60 months of service who successfully pass the PPP test will be eligible for this differential.

D. Administrative Actions

1. Failure of the PPP test for State Traffic Officers originally appointed prior to January 1, 1984, will result in the loss of eligibility for:
   a. voluntary initial assignment to Special Duty;
   b. promotion;
   c. voluntary Special Overtime programs.

2. Failure of one or more PPP tests by State Traffic Officers appointed on or after January 1, 1984, and all State Traffic Officer Cadets constitutes "unacceptable" performance. Continued unacceptable performance could ultimately result in adverse action pursuant to Government Code Section 19572. Failure will also result in loss of eligibility for:
   a. voluntary initial assignment to Special Duty;
   b. merit salary adjustment;
   c. promotion;
   d. voluntary transfer;

e. secondary employment;
f. voluntary Special Overtime programs.

"Initial" shall mean a change of assignment from road patrol to any Special Duty position regardless of any prior Special Assignment held.

"Special Duty" shall mean any duty other than road patrol in a Class E patrol vehicle.

E. Test Administration

1. State Traffic Officers appointed prior to January 1, 1984:

a. test site requirement will be in accordance with the Physical Performance Program Manual, HPM 70.9, Annex F. In no event will testing be conducted unless a defibrillator is readily available with a certified operator present;
b. employees failing the PPP test shall be given the opportunity to pass the work task prior to initiation of administrative action;
c. employees shall be tested annually. Re-testing for those who fail shall be quarterly;
d. failure of the PPP shall not, be itself, result in an unsatisfactory performance rating.

2. State Traffic Officers appointed on or after January 1, 1984, and all State Traffic Officer Cadets:

a. test site requirements will be in accordance with the Physical Performance Program Manual, HPM 70.9, Annex F. In no event will testing be conducted unless a defibrillator is readily available with a certified operator present;
b. the Department shall develop a remedial program for Officers who fail the PPP;
c. employees failing the PPP test shall be given the opportunity to pass the work task prior to the initiation of administrative action;
d. employees shall be tested annually. Re-testing for those who fail shall be at least quarterly.

F. Miscellaneous

1. Body fat shall be considered measurement only.

2. The Sit and Reach and Truck Strength Flexion tests shall be eliminated.

3. The Joint Advisory Committee shall be retained.

4. The Department shall make available a fitness prescription to any employee requesting one, and shall approve as job-related off-duty injuries incurred as a result of the prescribed fitness program.

5. Nothing in this agreement shall preclude the Department

from referring to an employee's physical fitness in any personnel document.

ARTICLE VI

17. **PPP Incentive Pay**

State Traffic Officers who have 60 or more months of service as a State Traffic Officer and successfully pass the Physical Performance Program as described in the Physical Performance Program Manual, HPM 70.9 shall receive a flat rate of $15.00 (fifteen dollars) for the September 1984 pay period and $65 (sixty-five dollars) per pay period for the duration of this agreement.

Attachment Page #6

Attachment Page #6

ATTACHMENT 3

Language from the 1983-85 labor agreement
between the Town of Winchester, CT and
I.B.P.O. Local 330:

ARTICLE 20

PHYSICAL CONDITIONING

SECTION 1: Annual physical examinations are to be taken by all uniformed officers regularly scheduled for duty. It shall be the Town's obligation and sole expense to provide an examining physician familiar with the conditioning program and qualified to give the required examination. In cases where the physician, for established medical reasons, considers it warranted, a re-examination may be scheduled in six(6) months. For an officer under private medical care at the time of examination, the Town physician, if so requested, will share his evaluation with the officers private physician.

SECTION 2: The Town, at its expense, will establish a physical conditioning program under the auspices of the Local YMCA, or other comparable facility.

SECTION 3: It is recognized that as to new hires the Town may impose reasonable standards of physical, mental and psychological performance and thus exert an understandable measure of control as to the capabilities of its recruits. In the case of an established force, the Town has accepted some limitations and some obligations and has agreed that it will not take disciplinary action against officers who fail to meet the physical standards of the program. It does, however, require the officers to cooperate and participate in a supervised program designed to help them get back into shape or, if in shape, to maintain current conditions.

SECTION 4: Each officer shall contribute at least one hour at the facility each week to the program without charge to the Town. For all required time at the facility during any week in addition to that single hour, the officer shall be paid his regular hourly rate (straight time) or, at the discretion of the Chief, be granted duty time to work out at the facility.

SECTION 5: The Town agrees that for any present officer whose doctor takes exception to the conditioning procedures, it will make acceptable accommodations to those procedures as they are to apply to that individual.

ATTACHMENT 4

Language from the 1982-84 labor agreement
between the City of Milford, CT and
I.A.F.F. Local 944:

ARTICLE XXIV. PHYSICAL FITNESS

A. A maximum acceptable weight program shall be established for all employees of the Milford Fire Department hired on or after the ratification date of this contract as follows:

> All employees of the Milford Fire Department shall be weighed by the Fire Chief or his designee within the first seven (7) days after February 1, 1983, and within the first seven (7) days after July 1, 1983, and on the same dates in each succeeding year. In the event any employee exceeds his or her maximum weight as shown on the chart annexed hereto as Exhibit A, he or she shall receive a one-day suspension without pay. In the event any employee exceeds his or her maximum three (3) consecutive times, he or she shall be suspended from duty without pay until such time as compliance with said weight chart is achieved.

B. As soon as possible following the execution date of this agreement, annual physical examinations for each employee shall be required. The examination shall be conducted by a physician selected by the City and the cost of said examination shall be paid by the City. Supplemental tests, if required, shall be defrayed by Blue Cross or Blue Shield, where applicable, provided no employee shall have any examination benefit under Blue Cross or Blue Shield diminished. Test results shall be reported to the Fire Chief and shall become part of the employee's personnel file. In the event an employee is deemed unfit for duty, test results may be sent to the City's pension board. In the event a question of continued employment arises as the result of an annual physical examination, the employee may, if he or she wishes, consult his own physician at his own personal expense. In the event a physician selected by the City and a physician selected by the employee are unable to agree concerning the continued employability of the employee, a third physician, chosen by the City physician and the employee's physician (with the cost of same to be shared equally by the City and the employee), shall be the final arbiter of the employee's medical status.

Additionally, following the execution date of this agreement, the City will explore the details of a physical fitness program with the Union in order to assure that Fire Department personnel shall remain in top physical condition. The details of such a program shall be negotiated with the Union.

EXHIBIT A

PAGE 1 of 2

MILFORD FIRE DEPARTMENT OFFICIAL WEIGHT CHART

MAXIMUM WEIGHT FOR FEMALES

HEIGHT (With Shoes On) 2 INCH HEELS	SMALL FRAME	MEDIUM FRAME	LARGE FRAME
5'0"	106-114	111-124	120-138
5'1"	109-118	114-127	123-141
5'2"	112-121	118-131	127-144
5'3"	116-124	121-134	130-147
5'4"	119-128	124-139	133-152
5'5"	122-131	128-143	138-156
5'6"	125-135	132-149	142-161
5'7"	130-140	136-153	146-165
5'8"	134-144	141-157	151-169
5'9"	139-149	145-162	155-174
5'10"	143-150	150-166	160-179
5'11"	147-158	154-171	164-185
6'0	152-163	155-175	168-190

For women between 18 and 25, subtract 1 pound for each year under 25.

EXHIBIT A

PAGE 2 of 2

MILFORD FIRE DEPARTMENT OFFICIAL WEIGHT CHART

MAXIMUM WEIGHT FOR MALES

HEIGHT (With Shoes On) 1 INCH HEELS	SMALL FRAME	MEDIUM FRAME	LARGE FRAME
5'4"	130-139	136-150	145-163
5'5"	133-142	140-153	149-167
5'6"	136-146	143-157	152-172
5'7"	141-151	147-162	156-177
5'8"	145-155	152-167	162-183
5'9"	150-160	156-172	166-187
5'10"	154-165	161-176	171-191
5'11"	158-169	165-182	175-197
6'0"	163-174	170-187	180-199
6'1"	167-178	174-193	185-203
6'2"	172-184	178-198	190-210
6'3"	176-188	184-198	190-210
6'4"	180-193	189-209	200-224

Courtesy of the Metropolitan Life Insurance Company.

Excerpt from NPELRA NEWSLETTER Vol.6, NO.3, Nov. 30, 1985

Ted Clark's Legal Corner

Public Safety Hiring & Retirement Policies Reviewed

State and local governments have a legitimate interest in ensuring that firefighters and police officers are in peak physical condition. Those who serve and protect the public are frequently required to perform strenuous physical activities in the normal course of their jobs.

Based on the assumption that age inevitably slows responses, saps strength, and increases the likelihood of sudden incapacitation through heart disease, many state and local governments have enacted legislation or maintained a policy that establishes maximum age limits for hiring and that requires mandatory retirement after a certain age for police officers and firefighters. In two recent decisions, however, the Supreme Court has significantly restricted an employer's ability to claim that age alone justifies a refusal to hire an older applicant or to require that an employee be terminated upon reaching a certain age, even when the employer claims that older workers cannot safely perform the job.

The Age Discrimination In Employment Act (ADEA) prohibits discrimination on the basis of age against employees who are between the ages of forty and seventy, unless age is shown to be a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." 29 U.S.C. * 623 (f) (1). In *Johnson v. Mayor and City Council of Baltimore*, U.S., 105 S. Ct. 2717 (1985), and *Western Airlines v. Criswell, U.S., 105 S. Ct. 2743 (1985), the Supreme Court considered and rejected arguments that the automatic retirement of police officers and flight engineers (navigators) were justified as a BFOQ under the ADEA.*

In Western Airlines v. Criswell, the airline argued that the Federal Aviation Act requires that airlines operate with "the highest degree of safety" and that because flight engineers are essential to in flight safety, the airline should be permitted to terminate flight engineers when they reach age sixty. Western claimed that after that age a flight engineer's performance becomes dangerously unpredictable. In light of its paramount duty to ensure passenger safety under the FAA, Western maintained that a mandatory retirement rule prohibiting flight engineers from flying after age sixty was necessary.

The Supreme Court unanimously rejected Western's argument, finding that the BFOQ exemption "'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." *Criswell*, 105 S. Ct. at 2751, *quoting Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Court held that in order for an employer to demonstrate that its age based mandatory retirement rule was valid, it must meet the two part test articulated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Thus, to establish that age is a BFOQ under the ADEA, an employer must first prove the existence of a job qualification "reasonably necessary to the essence of [its] business." *Criswell*, 105 S. Ct. at 2751. Second, the employer must show that it has "reasonable cause, that is a factual basis, for believing that all or substantially all persons [in the excluded age group] would be unable to perform safely and efficiently the duties of the job involved," or that it is "impossible or impractical" to accurately test and predict the capabilities of individuals in the excluded group. *Id. See Tamiami Trail*, 531 F.2d at 236.

While the Supreme Court in *Western* recognized that the safe transportation of passengers is the primary purpose of an airline's business, it found that recent advances in medical testing make possible individualized determinations of whether a particular flight engineer can safely continue to safely perform his duties after age sixty. Therefore, the Court held that Western had failed to satisfy the second prong of the *Tamiami Trail* test because a broad age based retirement policy for flight engineers was not reasonably necessary to ensure the safety of passengers and public.

In *Johnson v. Mayor and City Council of Baltimore*, the Supreme Court unanimously held that a federal civil service statute requiring federal firefighters to retire at age fifty-five did not establish that retirement before age seventy was a BFOQ for Baltimore's firefighters. Previously, the Fourth Circuit had upheld Baltimore's imposition of a general mandatory retirement age of fifty-five by relying on *EEOC v. Wyoming*, 460 U.S. 226 (1983). In that case the Supreme Court held the ADEA applicable to state and local government holding that state statutes instituting a mandatory retirement age should be tested "against a reasonable federal standard." *Id.* at 240. The Fourth Circuit in *Johnson* relied upon a federal statute which generally required federal firefighters to retire at age fifty-five, and held that law constituted a "reasonable federal standard." Therefore, even absent a factual showing that firefighters over fifty-five could not adequately perform their duties, the City of Baltimore had made out a BFOQ for age under the ADEA as a matter of law.

The Supreme Court reversed. The Court in *Johnson* held that the "reasonable federal standard" described in *Wyoming* was the ADEA itself; that is, whether the age limit is a BFOQ. The Court noted that in adopting the federal mandatory retirement age for firefighters, Congress had not acted out of considerations of safety or fitness. The Court concluded, "the history of the civil service provision, however, makes clear the decision to retire certain federal employees at an early age was not based upon bona fide occupational qualifications for the covered employment." 105 S. Ct. at 2733. Therefore, the Supreme Court held that the federal firefighter's statute did not operate to validate Baltimore's mandatory retirement statute under the ADEA.

In *Johnson*, the Supreme Court also stated that stereotypical assumptions about the effects of aging on employee performance were inadequate to demonstrate a BFOQ. Instead, the Supreme Court held that employers are required to make a "particularized, factual showing"

Continued on page 9

TED CLARK

Continued from page 2

with respect to each element of the BFOQ defense. *Johnson*, 106 S. Ct. at 2722. In this regard, it is noteworthy that until 1962, all Baltimore firefighters worked until age seventy.

Decisions since *Criswell* and *Johnson* make clear that a public employer cannot simply claim that fitness is necessary to fulfill the position of firefighter or policeman and that after a certain age employees are generally too old to carry out their duties properly. In *EEOC v. Commonwealth of Pennsylvania*, 768 F.2d 514 (3d Cir. 1985), the Court of Appeals for the Third Circuit considered a Pennsylvania statute which required state police officers to retire at age sixty. The Commonwealth claimed that "good health and reasonable fitness are job qualifications reasonably necessary" for a state police officer. *Id.* at 518. The District Court agreed. On appeal, however, the Third Circuit found that the District Court had failed to undertake the particularized factual analysis of the Commonwealth's BFOQ claim required by *Johnson*. The court found troublesome the fact that although the Commonwealth claimed that good health was necessary to the safe performance of the job, the Pennsylvania State Police, "makes no attempt to monitor the health and physical prowess of younger officers and indeed permits some of them to remain on the job with serious disabilities." *Id.*

By contrast, last month the District Court for the District of New Jersey refused to enjoin the State of New Jersey from retiring its police officers at age fifty-five. *EEOC v. New Jersey*, No. 85-2905 (D.N.J. October 7, 1985). The factors relied upon by the court were (1) the fact that even higher ranking New Jersey State officers must be prepared to assume the duties of those on street patrol; (2) an explicit legislative mandate requiring the state police to maintain physical fitness; (3) evidence that New Jersey has in the past required annual physical examinations; (4) that findings of fitness studies were incorporated into a police wide "Well Trooper Program;" (5) the fitness studies and results of the Well Trooper Program physicals were shared with a committee set up to propose ongoing fitness goals. This committee also retained outside consultants to review the data collected and recommend fitness and training standards. The court concluded,

> Defendants have made a strong showing that the continued health and fitness of all sworn members of the state police is reasonably necessary to the essential mission of the agency which is to protect the public . . . .
> Unlike other organizations which pay scant attention to the health needs of their employees while invoking those needs as the basis of a BFOQ . . . defendants' efforts are both impressive and credible.

The court then performed the particularized factual inquiry required by *Johnson* and found persuasive the medical evidence of state police officers' deteriorating physical capacity after age fifty-five.

In *Hahn v. City of Buffalo*, 770 F.2d 12 (2d Cir. 1985), the court considered an ADEA challenge to a New York State law establishing a maximum applicant age of twenty-nine for police officers in New York. The Second Circuit upheld a lower court's determination that age twenty-nine rule was not a BFOQ and thus violated the ADEA. The court noted that although ADEA challenges are usually brought to mandatory *retirement* statutes, the employer has an identical burden of proof to justify an age based *hiring* law.

In *Hahn*, the Second Circuit found that when courts across the country have been required to assess the validity of age based mandatory hiring and retirement statutes or policies, they have come to totally opposite conclusions. In particular, the *Hahn* court lamented the lack of a central decision making authority:

> One might think that for inquiries of such scope it would be preferable to have an administrative agency such as the EEOC make a determination on the basis of an extensive hearing record, with the result, after judicial review, normally binding throughout the country except in situations where a plaintiff could claim that policing a particular community was less arduous than in a typical community or when a municipal employer could claim the opposite. It seems somewhat anomalous for the lawfulness of maximum age limits on police hiring to depend on the particular evidence presented at various court trials throughout the country.

Hahn, 770 F.2d at 15. The Second Circuit found, nevertheless, that the ADEA gives each person between forty and seventy the right to a challenge on age based hiring or retirement policy, thus requiring each state and local employer to individually defend its particular law "despite the application of the same age limit to similar or even identical occupations in different communities." *Id.*

Until the courts are no longer required to act as medical experts and evaluate conflicting testimony on the effects of aging, identical age based hiring or retirement policies or laws will be found to be legal in some instances and to violate the ADEA in others. A public employer seeking to institute or defend such a statute or policy should make every effort to document its conclusion that all employees cannot safely perform their jobs after a certain age or that it is impractical or impossible to test each employee on an individual basis.

Legal Corner Update

Following the ruling by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit which reversed AFSCME's comparable worth victory in the *Washington State* case, the union announced that it would petition the full Ninth Circuit for a rehearing. In addition, the American Nurses Association has appealed a lower court's rejection of a wage discrimination claim based on the theory of comparable worth to the Seventh Circuit Court of Appeals. Since each of these decisions represented a rejection of the comparable worth theory, and were summarized in prior articles, we will keep you apprised of their status on appeal.

Senator **Nickles**. Thank you very much.

Next we have Mayor Max Chiddister, from Goshen, IN. I might mention to you, Mayor, that Senator Quayle also has been active on this issue and has legislation introduced that we will be considering as well.

Mayor **Chiddister**. Thank you, and good morning. I am Max Chiddister, Mayor of Goshen, IN, a city of nearly 20,000 population, located in northern Indiana. I also serve as first vice president of the Indiana Association of Cities and Towns. I appreciate the opportunity to briefly address you on a matter of great concern to the municipalities and public safety officers in Indiana.

Recent developments involving the application of the Age Discrimination in Employment Act to public safety departments have led to the initiation of litigation against a number of Indiana cities. In my written testimony, I have attached a list of the cities that have been charged by the Federal Equal Employment Opportunity Commission as a consequence of following Indiana statutes which set a maximum age limit for hiring police officers and firefighters.

Our legislature has subsequently repealed the statutes, but we are faced with what we consider a very serious and at the same time narrow problem, ensuring a public safety force that is fit to provide the best public safety service to our taxpaying citizens.

In that spirit, we support the provisions of S. 1240 which Senator Quayle did set forward, which would lower the mandatory retirement and hiring protections from age 70 to age 55 for public safety officers. We ask for your support of those provisions and offer the following observations and facts.

There is consensus for such legislation among all affected groups in Indiana. I have been contacted by our largest city, Indianapolis, and by some of our smallest cities, expressing their support. This legislation is also endorsed by the affected labor organizations, the Indiana Fraternal Order of Police and the Professional Firefighters Union of Indiana. The need for congressional action has been recognized by the chairmen of the Labor Committees of the Indiana General Assembly.

We seek only a narrow exception to the age 70 retirement protection. The functions of a firefighter and law enforcement officer are generally consistent from one jurisdiction to another and can be strictly defined. There is a basis for special physical and health standards. In fact, Congress has already recognized this in establishing an age 55 retirement for Federal police officers and firefighters.

Since the 1903's, our General Assembly has established extensive pension and disability programs for public safety officers. It is our understanding that a number of our fellow States have done the same. In our State, as in a number of other States, legislation has intertwined disability benefits within our pension system. The benefit levels were established on the basis of a relatively low hiring age. If we are unable to establish a 55 retirement age, we will need to segregate the disability benefits from the pension system.

It will be difficult to make these adjustments without jeopardizing the security that existing employees feel they have under current statutes. For example, under Indiana law, a public safety officer who is disabled for any reason receives full benefits, regardless of his or her longevity. The benefit levels were established on the basis of anticipated costs for employees beginning employment in the 20 to 35 age range. The impact of extending these benefits to persons who are hired at an older age was not anticipated when the statute was enacted.

Some might argue that existing laws and regulations allow us the opportunity to establish lower age requirements through the bona fide occupational qualifications procedure. While at first blush this appears to be an alternative, it is our assertion here today that court decisions have interpreted this exemption so narrowly as to render it impractical.

Further, it is our understanding that there have been no regulations promulgated by the EEOC with respect to the standards that must be met to establish a genuine BFOQ exception. While Indiana is presently pursuing the establishment of an age 55 standard through that process, we find that there are no good tests to predict health and physical condition for the discharge of public safety duties.

In our search for such tests we are advised by some medical experts that the tests are not reliable and may in some cases pose a danger to the applicant. May I point out again that the Federal Government did not go through the BFOQ process to establish their age 55 requirement for Federal police officers and firefighters.

It is not our intention to decrease employment opportunities for our older Americans. As an elected official, I strongly feel that we all need to be more sensitive to the abilities that all segments of our population possess, including our senior citizens.

We ask only for a very narrow and limited exception which we feel is both rational and justifiable. Waking up to a fire alarm at 3 in the morning to fight a fire in temperatures below zero is not for everyone, nor scrambling up a 30-foot ladder with full gear on, spending hours working a high-pressure hose to fight a fire, nor answering a call to a home to break up a domestic fight. Neither is chasing a criminal on foot for several blocks and wrestling him to the ground to bring him in under arrest.

Finally, to be unable to perform a job the way it must be done and not carry your share of the load can be just as mentally anguishing as not being able to apply for a job at all.

Thank you, Mr. Chairman.

[The prepared statement of Mayor Chiddister follows:]

STATEMENT BEFORE SENATE LABOR SUB-COMMITTEE
Max R. Chiddister
Mayor, City of Goshen, Indiana
March 18, 1986

Good morning. I am Max Chiddister, Mayor of Goshen, Indiana, a city of nearly 2,000 population located in northern Indiana. I also serve as First Vice President of the Indiana Association of Cities and Towns. I appreciate the opportunity to briefly address you on a matter of great concern to the municipalities and public safety officers in Indiana.

Recent developments involving the application of the Age Discrimination in Employment Act (ADEA) to public safety departments have led to the initiation of litigation against a number of Indiana cities. In my written testimony, I have attached a list of the cities that have been charged by the Federal Equal Employment Opportunity Commission (EEOC) as a consequence of following Indiana statutes which set a maximum age limit for hiring police officers and firefighters. Our Legislature has subsequently repealed the statutes, but we are faced with what we consider a very serious, and at the same time narrow, problem -- ensuring a public safety force that is fit to provide the best public safety service to our taxpaying citizens.

In that spirit, we support the provisions of S.1240 which would lower the mandatory retirement and hiring protections from age 70 to age 55 for public safety officers. We ask for your support of those provisions and offer the following observations and facts.

1. There is consensus for such legislation among all affected groups in Indiana. I have been contacted by our largest city, Indianapolis, and by some of our smallest cities, expressing their support. This legislation is also endorsed by the affected labor organizations, the Indiana Fraternal Order of Police and the Professional Firefighters Union of Indiana. The need for Congressional action has been recognized by the chairman of the Labor committees of the Indiana General Assembly.

2. We seek only a narrow exception to the age 70 retirement protection. The functions of a firefighter and law enforcement officer are generally consistent from one jurisdiction to another and can be strictly defined. There is a basis for special physical and health standards. In fact, Congress has already recognized this in establishing an age 55 retirement for Federal police officers and firefighters.

3. Since the 1930's, our state Legislature has established extensive pension and disability programs for public safety officers. It is our understanding that a number of our fellow states have done the same. In our state, as in a number of other states, legislation has intertwined disability benefits within our pension system. The benefit levels were established on the basis of a relatively low hiring age. If we are unable to establish a 55 retirement age, we will need to segregate the disability benefits from the pension system. It will be difficult to make these adjustments without jeopardizing the security that existing employees feel they have under current statutes. For example, under Indiana law, a public safety officer who is disabled for any reason receives full benefits regardless of his or her longevity. The benefit levels were established on the basis of anticipated costs for employees beginning employment in the 20-35 age range. The impact of extending these benefits to persons who are hired at an older age was not anticipated when the statute was enacted.

(over)

Some might argue that existing laws and regulations allow us the opportunity to establish lower age requirements through the Bonafide Occupational Qualifications (BFOQ) procedure. While at first blush this appears to be an alternative, it is our assertion here today that Court decisions have interpreted this exception so narrowly as to render it impractical. Further, it is our understanding that there have been no regulations promulgated by the EEOC with respect to the standards that must be met to establish a genuine BFOQ exception. The Supreme Court in the case of Western Airlines v. Criswell, U.S., 105 S.Ct.2743 (1985) established a two-pronged test for a valid BFOQ exception. First, the employer must prove that the existence of a job qualification is reasonably necessary to the essence of its business, and second, that some or substantially all persons in the excluded age group would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to accurately test and predict capabilities of individuals in the excluded group. While Indiana is presently pursuing the establishment of such tests, we find that there are no good tests to predict the health and physical condition for the discharge of public safety duties. In our search for such tests, we are advised by some medical experts that the tests are not reliable and may, in some cases, pose a danger to the applicant. Again, I would like to point out that the Federal government did not go through the BFOQ process in establishing their 55 age requirement for Federal police officers and firefighters.

In conclusion, let me emphasize that we do not intend to decrease employment opportunities for our older Americans. As an elected official, I strongly feel that we all need to be more sensitive to the abilities that all segments of our population, including our senior citizens, possess. We ask for a very narrow and limited exception which we feel is both rational and justifiable.

Waking up to an alarm at 3:00 in the morning to fight a fire in temperatures below zero is not for everyone.

Scrambling up a 30-foot ladder with full gear on and spending hours working a high pressure hose to fight a fire is not for everyone.

Answering a call to a home to break up a domestic fight is not for everyone.

Chasing a perpetrator on foot for several blocks and wrestling with him to bring him in is not for everyone.

To be unable to perform a job the way it must be done and not carry your share of the load can be just as mentally anguishing as not being able to apply for a job at all.

Thank you.

ATTACHMENT "A"

1.	Charge No. 053850125 City of Lafayette Police Dept.	Charge No. 053850172 State of Indiana
2.	Charge No. 053840126 City of Michigan City Police Dept.	Charge No. 053850173 State of Indiana
3.	Charge No. 053850127 City of Elkhart Police Dept.	Charge No. 053850174 State of Indiana
4.	Charge No. 053850128 City of Kokomo Police Dept.	Charge No. 053850175 State of Indiana
5.	Charge No. 053850129 City of Terre Haute Police Dept.	Charge No. 053850176 State of Indiana
6.	Charge No. 053850130 City of East Chicago Police Dept.	Charge No. 053850177 State of Indiana
7.	Charge No. 053850131 City of Muncie Police Dept.	Charge No. 053850178 State of Indiana
8.	Charge No. 053850132 City of Anderson Police Dept.	Charge No. 053850179 State of Indiana
9.	Charge No. 053850133 City of Hammond Police Dept.	Charge No. 053850180 State of Indiana
10.	Charge No. 053850134 City of Evansville Police Dept.	Charge No. 053850181 State of Indiana
11.	Charge No. 053850135 City of South Bend Police Dept.	Charge No. 053850182 State of Indiana
12.	Charge No. 053850136 City of Fort Wayne Police Dept.	Charge No. 053850183 State of Indiana
13.	Charge No. 053850137 City of Gary Police Dept.	Charge No. 053850184 State of Indiana
14.	Charge No. 053850138 City of Lawrence Police Dept.	Charge No. 053850185 State of Indiana
15.	Charge No. 053850139 City of Merrillville Police Dept.	Charge No. 053850186 State of Indiana
16.	Charge No. 053850140 City of Huntington Police Dept.	Charge No. 053850187 State of Indiana
17.	Charge No. 053850141 City of Valparaiso Police Dept.	Charge No. 053850188 State of Indiana
18.	Charge No. 053850142 City of Portage Police Dept.	Charge No. 053850189 State of Indiana

19.	Charge No. 053850143 City of Crawfordsville Police Dept.	Charge No. 053850190 State of Indiana
20.	Charge No. 053850144 City of LaPorte Police Dept.	Charge No. 053850191 State of Indiana
21.	Charge No. 053850145 City of Highland Police Dept.	Charge No. 053850192 State of Indiana
22.	Charge No. 053850146 City of Jeffersonville Police Dept.	Charge No. 053850193 State of Indiana
23.	Charge No. 053850147 City of Connersville Police Dept.	Charge No. 053850194 State of Indiana
24.	Charge No. 053850148 City of New Castle Police Dept.	Charge No. 053850195 State of Indiana
25.	Charge No. 053850149 City of Bloomington Police Dept.	Charge No. 053850196 State of Indiana
26.	Charge No. 053850150 City of Columbus Police Dept.	Charge No. 053850197 State of Indiana
27.	Charge No. 053850151 City of New Albany Police Dept.	Charge No. 053850198 State of Indiana
28.	Charge No. 053850152 City of Mishawaka Police Dept.	Charge No. 053850199 State of Indiana
29.	Charge No. 053850153 City of Marion Police Dept.	Charge No. 053850200 State of Indiana
30.	Charge No. 053850154 City of Richmond Police Dept.	Charge No. 053850201 State of Indiana
31.	Charge No. 053850155 City of Shelbyville Police Dept.	Charge No. 053850202 State of Indiana
32.	Charge No. 053850156 City of Griffith Police Dept.	Charge No. 053850203 State of Indiana
33.	Charge No. 053850157 City of Speedway Police Dept.	Charge No. 053850204 State of Indiana
34.	Charge No. 053850158 City of Wabash Police Dept.	Charge No. 053850205 State of Indiana
35.	Charge No. 053850159 City of Warsaw Police Dept.	Charge No. 053850206 State of Indiana
36.	Charge No. 053850160 City of Frankfort Police Dept.	Charge No. 053850207 State of Indiana

37.	Charge No. 053850161 City of Peru Police Dept.	Charge No. 053850208 State of Indiana
38.	Charge No. 053850162 City of West Lafayette Police Dept.	Charge No. 053850209 State of Indiana
39.	Charge No. 053850163 City of Whiting Police Dept.	Charge No. 053850210 State of Indiana
40.	Charge No. 053850164 City of Carmel Police Dept.	Charge No. 053850211 State of Indiana
41.	Charge No. 053850165 City of Munster Police Dept.	Charge No. 053850212 State of Indiana
42.	Charge No. 053850166 City of Greenwood Police Dept.	Charge No. 053850213 State of Indiana
43.	Charge No. 053850167 City of Goshen Police Dept.	Charge No. 053840214 State of Indiana
44.	Charge No. 053850168 City of Clarksville Police Dept.	Charge No. 053850215 State of Indiana
45.	Charge No. 053850169 City of Vincennes Police Dept.	Charge No. 053850216 State of Indiana
46.	Charge No. 053850170 City of Bedford Police Dept.	Charge No. 053850217 State of Indiana
47.	Charge No. 053850171 City of Logansport Police Dept.	Charge No. 053850218 State of Indiana

National Governors' Association

Lamar Alexander
Governor of Tennessee
Chairman

Raymond C. Scheppach
Executive Director

March 14, 1986

The Honorable Don Nickles
Chairman
Subcommittee on Labor
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At the 1983 annual meeting of the National Governors' Association, the Governors adopted policy urging changes in the Age Discrimination in Employment Act to permit state and local governments to establish hiring and retirement criteria consistent with the public safety. A copy of the policy is enclosed.

NGA strongly opposes discrimination of any kind. However, we believe just as firmly that state and local governments must do all they can to assure the safety of the public. To this end, many states have established requirements affecting the retirement and entry ages of firefighters and law enforcement personnel. According to one count, at least thirty-two states have established such restrictions.

The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to discriminate against any employee or potential employee between the ages of 40 and 70 on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." In 1974, the definition of "employer" was extended to include state and local governments. However, federal law enforcement officers were excluded from coverage, and mandatory retirement requirements are in effect for federal firefighters, traffic controllers, the FBI, the Secret Service, and federal prison employees.

We believe that the rationale for exempting federal public safety officials from the ADEA is equally persuasive in support of an exemption of state and local public safety employees. Moreover, we believe that the federal government should avoid dictating the employment decisions of the states, even if it were willing to apply the same standards to its own workers.

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The current situation has spawned costly lawsuits at the state and local level, adding to the expenses incurred by those states which are reviewing their occupational qualification standards to comply with the federal requirements. One state, West Virginia, reported that it had already spent almost $80,000 on the job standards review and in the meantime had paid more than $60,000 to settle lawsuits stemming from the ADEA. It has been estimated that Indiana's process for establishing job standards will cost a quarter of a million dollars. Government jurisdictions in twenty-one other states face similar costs.

Legislation can be drafted to strike a balance between the imperative of eliminating employment discrimination and the need to ensure the public safety. H.R. 1435 and its Senate companion, S. 698, offer such an approach. We urge the Subcommittee to favorably report remedial legislation of this type at the earliest possible time.

Sincerely,

Raymond C. Scheppach
Executive Director

Enclosure

cc: Members of the Subcommittee

RETIREMENT AND HIRING PROVISIONS AFFECTING STATE PUBLIC SAFETY OFFICIALS

The Supreme Court recently held in EEOC v. Wyoming that the federal Age Discrimination in Employment Act covers state and local governments as a valid exercise of Congress' commerce power. This 5-4 decision invalidated those states' statutes which require certain law enforcement officers to retire at age 55. In so ruling, the Court also rendered invalid state and municipal statutes which make retirement prior to age 70 mandatory for their law enforcement and/or fire fighting officials. The decision also has implications for states and municipalities which set maximum hiring ages for certain types of employment.

The National Governors' Association believes that federal policy in this area is inconsistent because it exempts certain federal law enforcement officials while mandating state compliance. The Association believes, further, that establishing employment criteria and selecting employees are traditional functions of state government which should be limited only by constitutional requirements. Finally, the Association believes that the public has the right to expect that both its federal and state law enforcement officers are capable of adequately performing their duties to insure protection of the public safety. Safeguarding this right may require the use of systems which could include retirement of these officials at under 70 years of age and use of maximum hiring age requirements.

The National Governors' Association urges adoption of legislation which exempts state law enforcement officials from the provisions of the Age Discrimination in Employment Act, thereby permitting states to establish hiring and retirement criteria consistent with public health and safety.

Adopted August 1983.

Senator NICKLES. Mayor, thank you very much for your comments.

Our next panelist is Ronald Buckler, deputy attorney general, from Indianapolis.

Mr. BUCKLER. Thank you, Senator Nickles. I am Ron Buckler, from the State of Indiana, the attorney general's office there, and I am here representing the National Association of Attorneys General, and I am also on an oversight committee appointed by the Governor of Indiana to look at the physical and mental examination requirements for law and fire protective service employees, and also whether or not age can be a BFOQ under the ADEA.

At present, the estimated cost of that is anywhere between $25,0000 and $500,000 to conduct such a study, with approximately 300 cities in the State of Indiana, 92 counties and numerous State agencies as well involved, it will be a protracted program to try to ferret out the facts.

As the EEOC representative earlier stated, I too am a public servant but I am just not satisfied with doing my job, and as most of these individuals who have come before you testified, we find the issue too big to just be satisfied with the EEOC's interpretation of what the BFOQ defense means and how can we resolve the major issue of providing our protective service employees with the protections that we find necessary and what we believe age requirements can do.

We only seek an exemption for the protective service employees, for those men and women who protect us in our communities.

Since 1982 I have been involved in litigation. There are approximately 50-some cities who had charges of discrimination filed in the State of Indiana, the Indiana State Police, the Department of Natural Resource, conservation officers, excise police have been charged.

What it got to was that we found that without a prior study having been done, because our laws were some 50 years old approximately, we had to do a study, and much like New Jersey had done, Col. Pagano's State.

We took out all the age requirements and are now in the process of doing a study, but not before we had gotten into the litigation process up to our necks.

I noticed that the EEOC mentioned something about 33 States being affected. I believe that there are really 50 States being affected, and that many of those States who do not, and many of those cities and towns who do not have age requirements would do so if given the opportunity.

I note that in the House of Representatives a request was made of the EEOC to submit a list of cities and towns and lawsuits involving them, and their response was here is what we have but due to costs we cannot give you any more. However, luckily I have been in contact with many States and we sort of have joined together in our defenses because we see that it affects us all.

I have discussed a case personally with North Carolina attorney's, Massachusetts, Wyoming, Missouri, Kentucky, Illinois—I can go on and on. In the State of Massachusetts, the *EEOC* v. *Frank Trabucco*, a case that the State had won after again protracted litigation, in response to a motion to comply the EEOC was required by the court to answer basically the same question, and there many, many more cases were pointed out, 36 pages of lawsuits which were between 1980, 1981 and up to that time, 1984, I believe.

So I believe that the effect is much greater than what the EEOC has said. I know that morale is low among the police officers because for years these men have been looking for their retirement, they have been looking at a disability. For instance, the State police in Indiana get 90 days of sick leave, more than most industries would ever allow employees. It is a recognition that the job is hard.

We are not against the discrimination provisions in any of the statutes dealing with civilian employees or even those employees who work for the State department that are not troopers, such as radio operators or weigh masters. Those we are not contesting. It is just those individuals who do the job of police and fire.

I think that something as—over the years now we have talked with many experts and in response to the EEOC's argument that testing is the answer, I would submit that testing is something that they are looking at and most States and cities would like to be able to afford, but testing I do not believe is the only answer and can be the only answer. I think it is just as discriminatory to deny a man employment or to fire a man simply because his blood pressure was high on a certain day or his chloresterol level was too high.

I noticed in The Washington Post yesterday, in the business section, a company named Biomark has been developing a new test procedure for risk analysis, genetic codes, and I find the final outcome of that to be quite hard to implement because I do not think we can discriminate simply because of a genetic factor develops that a man has a higher incidence of heart disease than, say, someone else.

So I think that the age requirements, because they were agreed to by both the governmental employers and the government employees, is entitled to some perhaps contractual deference. And I can assure you that if the FOP or the fire associations believe that we were discriminating against employees, they would be the first to go to the legislature or the first to go to their employers and see that these changes were made.

I do not want to take too much more of your time, but I would like to stress that it is the position of the National Association of Attorneys General that it is imperative that an amendment be made to the act.

Thank you.

[The prepared statement of Mr. Buckler follows:]

WRITTEN TESTIMONY

BEFORE SENATE SUBCOMMITTEE ON LABOR

CONCERNING WHETHER STATE AND LOCAL GOVERNMENTS SHOULD BE PERMITTED TO SET THEIR OWN RETIREMENT POLICIES AND WHAT IMPACT THE AGE DISCRIMINATION IN EMPLOYMENT ACT SHOULD HAVE ON THOSE POLICIES

RONALD D. BUCKLER, DEPUTY ATTORNEY GENERAL
STATE OF INDIANA
REPRESENTING NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

MARCH 18, 1986

Mr. Chairman, Members of the Committee, I appreciate the opportunity to present to you testimony on why state and local governments should be permitted to set their own retirement policies and why the Age Discrimination in Employment Act (ADEA) should not apply to those policies.

As you know, certain amendments have been introduced in the Senate by Senators Quayle (S.1240), Bradley (S.698) and Ford (S.62) concerning the issue of such an exclusion from the ADEA, and each has attracted a broad, bipartisan group of co-sponsors from several states.

The impetus for this legislation is the 1983 Supreme Court decision, EEOC v. Wyoming, which held that the ADEA, which prohibits discrimination against most workers between the ages of 40 and 70, covers state and local governments as a valid exercise of Congress' commerce power. While we do not quarrel with the central thrust of this decision -- that state and local government employees should be protected from arbitrary age discrimination along with their federal and private sector counterparts -- we point out that an exception to the act's application exists for federal public safety officers, and maintain that the same exception should apply to state and local public safety officers.

The proposed amendment would make it clear that state and local governments may set their own hiring and retirement ages for public safety officers, including police and fire fighters, just as the federal government has done with federal public safety officers who regularly face unique mental and physical demands.

The Wyoming decision has brought into litigation nearly every state and countless municipalities with the Equal Employment Opportunity Commission (EEOC) in defending a retirement age of less than 70 for their state and local public safety officers. For example, Missouri and California require their state highway patrolmen to retire at 60, while Vermont, New Jersey and my own state of Indiana mandate retirement of these officers at age 55. The mandatory retirement age will vary from state to state, and often, between state and local municipality as well as municipality to municipality. States and localities must now raise their retirement ages to 70, or risk costly and protracted litigation.

The reaction to raising the retirement age to 70 has been uniform. It is not acceptable to the employing government entities nor the employees who are directly affected by it. Numerous state and local organizations, as well as numerous law enforcement groups, have called on Congress to resolve this problem which so directly affects public safety for all of us. Among others, the National Governors Association, the National Association of Attorneys General and the National Association of Counties have endorsed these bills.

More specifically, those whose careers and livelihoods will be determined by this legislation -- the individual state trooper, sheriff, police officerand fire fighter -- strongly support such legislation. The 53,000 member Fraternal Order of Police Association, the 45,000 member National Sheriff's

Association, the AFL-CIO affiliated International Association of Fire Fighters, the 30,000 member National Trooper Coalition and the 14,000 member International Association of Chiefs of Police likewise endorse the concept presented by this legislation.

In the area of public safety employment, the physiological changes due to the process of aging may place not only the public safety officer in jeopardy, but also the public whom he or she is sworn to serve.

The irony of all the above is that the EEOC, the agency charged with enforcing the ADEA, agrees with the state and local agencies that an officer not able to properly perform should be terminated. Their position, however, is that each officer should be individually evaluated rather than retire upon reaching a certain age. Such a position places enormous cost and liability upon the agency to constantly monitor and observe every individual officer for signs of failing health. This is an impossible task to do for medical professionals, let alone police administrators, and such requirements will not necessarily result in an improved police or fire department. The only certainty that will result is that those individuals who fail a performance or physical standard will surely attack the validity of the test through the courts.

Furthermore, pension and insurance statisticians tell us that increased age will also cause an increase in occupational injuries and disability pension costs as well as require numerous modification to retirement benefits for these public safety employees.

Federal agencies, such as the FBI, Secret Service, Drug Enforcement and Military, all of whom often work side by side with the local officer, have a mandatory retirement age of 55 or younger. Yet, the demands placed on the federal officer are usually the same or are less strenuous and exerting than those required of his local counterpart.

A review of the legislative history reveals that Congress authorized age limits for federal law enforcement officers because of the nature of their jobs, and not because they were performed by federal rather than state or local employees. There is nothing in the legislative history to demonstrate a congressional belief or intent that age limits for state and local law enforcement personnel were to be treated any differently than those applicable to federal employment.

The argument of the EEOC that state and local governments may maintain retirement ages of less than 70 or maximum entry ages pursuant to the bona fide occupational qualification (BFOQ) exception of the ADEA, section 4F(1), is true if the entity seeking to uphold it can demonstrate that the age limitation is "reasonably necessary to the normal operation of the particular business". This is always a factual determination, but it has been made even more difficult by the actions of the EEOC. The EEOC has taken the BFOQ exemption from the Civil Rights Act and decided that age discrimination should be put in the same class as race and sex discrimination. Many EEOC lawsuits against states and local governments have resulted.

Expenditures of great sums of money, public time and effort in EEOC lawsuits are not in everyone's best interest. Exceptions should be carved into the ADEA allowing states, counties and cities to establish their own ages of hiring and retirement of their public safety officers. Exclusionary language of this type would not compromise the basic purpose of the ADEA.

The standard adopted by the EEOC particularly in cases involving public safety officers, has been interpreted differently from court to court. While some entrance and retirement ages have been upheld for sheriffs, police, fire fighters and state troopers, others involving the same occupations have been struck down. Conflicting judicial holdings have created a nightmare of chaos and confusion in state and local governments in the public safety sectors. Jurisdictions wishing to uphold their standards must prepare for costly, time consuming and exhaustive litigation brought by the EEOC. Those who lack the resources to defend their age limits, particularly cities and towns, must consider abandoning the limits, thereby suffering the very consequences avoided by federal public safety personnel. In Indiana alone there were over 50 separate cities charged by the EEOC regarding the hiring age requirements and the cost in defending the position of the Indiana State Police will approach a million dollars.

The EEOC's requirement that state, counties and cities establish BFOQ's will not eliminate the legal battles between the EEOC and the state and local entities. Issues on the frontier will surely develop over performance and physical testing standards as they relate to the individuals, their sex and again their age, i.e., performance ability of someone in his 20's vs. someone in his 60's. The states will continually spend large sums of money in establishing such qualifications, setting up periodic testing procedures of uncertain reliability and medical examinations which may or may not detect disease.

In Indiana public safety officials, police and fire associations, experts from medicine, psychology, physiologists, both civilian and military, among others are being employed to aid the state in establishing BFOQ's. The estimated cost of these experts will approach one quarter million dollars in the initial stages.

Only an amendment exempting state and local governments from the ADEA in the limited area of public safety employment would halt this federal interference. It would allow the states to implement maximum hiring and mandatory retirement ages for those in the occupations involving public safety in the area of police and fire.

For reasons of public safety, safety of the men and women who so faithfully serve and protect our communities, and in the furtherance of the rights, of our several state and local governments to effectively and efficiently provide protection to their citizens, I strongly urge your favorable consideration of this amendment.

Ronald D. Buckler
Ronald D. Buckler
Deputy Attorney General

Senator **Nickles**. Thank you very much.

Mr. Pagano?

Colonel **Pagano**. Mr. Chairman, I thank you for the opportunity to appear before the subcommittee, but I would like to point out before I begin my comments that I do not represent only the New Jersey State Police. I was the general chairman of the State and Provincial Division of the International Association of the Chiefs of Police when the *Wyoming* decision was returned. I represented or began at that time representing the IACP, but more specifically the State and Provincial Division of the IACP.

Before I came here today, I checked my records and made contacts with the superintendents across the Nation. With the exception of Hawaii which does not have a State-level agency. Each of the State Police/Highway Patrol superintendents, including Colonel Biggers of Oklahoma, is firmly behind seeking an exemption.

Senator, rather than read my statement into the record I would prefer to address those issues and answer those questions which have been raised here today.

The BFOQ exemption to the ADEA is not practically accomplished. To be sure it is costly. Actual cost thus far to the State of New Jersey in pursuing our case through the Federal district court is in excess of $150,000. Every police and fire agency in New Jersey—and you have heard it voiced at this table many times—would have to undergo a similar situation were they to pursue a BFOQ exemption.

In 1983 Governor Kean recognizing the impact of the BFOQ showing on the State of New Jersey addressed the National Governors Association seeking their support for an exemption to the BFOQ. While there are no representatives here this morning from the National Governors Association, they have supported since that date an exemption to the BFOQ in whatever form; be it Senator Bradley's Ford's, or any other Senate version.

We decided early on in New Jersey that we would recognize the provisions of the ADEA and not only would we try our very best to comply, but would also lead the effort to seek an exemption because of the practical aspects of the problem we are facing.

We have spent 3 ½ years seeking an exemption and that is too long. We are in the public safety business. Administering our people is certainly part of our function, but there has been an inordinate amount of time and effort spent trying to do what we are doing not only for New Jersey but the other State level policing agencies.

Senator, we have experienced mandatory retirement litigation brought against us by the EEOC. However, as I heard it mentioned here earlier I don't believe it is a vendetta on the part of the EEOC. But I would say that in my judgment I believe the EEOC does not recognize any such thing as a BFOQ showing.

We have set standards. We have gone through the full routine. I believe we have probably at this point in the injunction process reached the most particularized decision by any district court in the Federal system in this Nation. Just last Friday we completed our particular end of that hearing; the trial on the merits. We are waiting for Judge Barry's decision at this time.

But, getting back to that word "vendetta" and the word "opposition," some of the physical standards that have been discussed are accepted on both sides of the aisle. One of the experts most knowledgeable in this area is Col. Earl Ferguson, of the U.S. Air Force. The State of New Jersey was able to retain him as an outside consultant because we thought from what we had read that he had the best information available on setting the physical standards.

Early on in the injunctive hearing the EEOC moved to exclude him and Judge Barry put it down very quickly.

In a Tennessee decision last week, the district court judge who did not have access to Dr. Ferguson, but in recognition of the arguments made by the State of Tennessee moved the Ferguson testimony into the record and relied heavily upon it when he rendered his final decision.

I think that if we are looking for the best evidence and looking for setting standards, we have got to look to the people who are most qualified, and in my view this particular individual, who is an M.D., a cardiologist, a physiologist, and a person with a long research background in this area, is the kind of person that both sides should be looking to. If we are to go the BFOQ route then we ought to set physical standards.

We have set in New Jersey a physical standard that I have just expressed and communicated to every individual of my organization. The standard is 41 milliliters of oxygen per kilogram of body weight per minute. In practical terms, that means run a mile and half in 12.5 minutes. Other exercises are also included. But even with this, we find a physical showing that is acceptable on both sides of the aisle. What is pertinent is the current Air Force standard and the manner in which they test their flight crews. Very practically put, if you have any problems anywhere in your physical and you are either on flying status as a pilot or as a crew member, you are taken off flying status until you are subjected to a catheter, and only the catheter can reasonably tell whether you are meeting a physical standard which the Air Force uses.

That is not acceptable in the fire and police service. That is surgery. It is expensive and it is intrusive.

What I am saying very simply is that the States, the counties and municipalities for many years have looked at their own particular needs. We have engaged in what you have referred to here today as pension systems, and really what we have developed over the years are not pension systems, but deferred compensation which is intended to give the policeman and the firefighter a monetary incentive to leave earlier so that the states can maintain a viable, healthy, young work force, just as they do in the military and in the Federal enforcement area.

I know that it is a trauma for a man to retire prematurely, and I know that that is protection that is really offered by the ADEA, and I would not want to intrude into that. But, what I would say is that the States and the counties and municipalities have their own differing needs, that we pay our people handsomely to retire early so that we can meet our needs.

The majority of our senior people retiring find livable salaries as part of the pension proram, and I think that this exemption is warranted. I think there is chaos in this business or field, and I think the Senate has got to look critically at the amendments that have been offered.

[The prepared statement of Colonel Pagano follows:]

NEW JERSEY STATE POLICE

"THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 AND ITS IMPACT ON THE HIRING AND RETIRING PROCEDURES OF THE NEW JERSEY STATE POLICE AND OTHER LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS"

Colonel Clinton L. Pagano
Superintendent
New Jersey State Police
March 18, 1986

TABLE OF CONTENTS

Subject	Page Number
Introduction	1
The Age Discrimination in Employment Act of 1967 (A.D.E.A.)	2
The First Wyoming Decision	3
Chief Justice Burger's Dissenting Opinion	4
The Second Wyoming Decision	5
Bona Fide Occupational Qualifications in Policing	6
The New Jersey Public's Perception of a Trooper's Age	10
Perceptions of the New Jersey State Police Retirement System (N.J.S.A. 53:5A-3 et seq.)	13
New Jersey State Police Affirmative Action Goals	15
New Jersey State Police Mandatory Retirement B.F.O.Q. and Litigation	16
Summary	18

INTRODUCTION

On March 2, 1983, the United States Supreme Court rendered its decision in Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983). That decision has had far-reaching effects on the maximum hiring and mandatory retirement age policies of police and firefighting organizations throughout the United States. For example, after the Wyoming decision, New Jersey's attorney general issued a formal opinion in which he declared a State statute invalid and unenforceable. That statute, which was subsequently repealed, required New Jersey State Police personnel to retire at age 55 after 25 years of service. Other police and firefighting organizations, for example, New York State Police, Pennsylvania State Police, Baltimore City (Maryland) Fire Department, Massachusetts State Police, Missouri State Highway Patrol, etc., have gone to court to defend their hiring and retirement age policies. The impact of the Wyoming decision has left police and firefighting administrators in somewhat of a quandary since the court requires that we individualize our pension programs and demonstrate that age is a bona fide occupational qualification.

While previously serving as General Chairman of the State and Provincial Division of the International Association of Chiefs of Police, I accepted the responsibility of determining the full impact of the Wyoming decision and what avenues of redress might be available. Although my term as General Chairman has expired, I continue to serve that organization on the age discrimination issue. I have discussed the Wyoming decision with all of the Division's regional representatives and the majority of state police administrators throughout the United States. As a result of those discussions, I learned that they share my view that age 40 is not a realistic hiring age and that age 70 for mandatory retirement in our calling is equally inappropriate. Finally, and most importantly, I found unanimous support for New Jersey's effort to obtain an exemption to the Age Discrimination in Employment Act for law enforcement officers and firefighters.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (A.D.E.A.)

The A.D.E.A., 81 Stat. 602, as amended 29 U.S.C. Section 621 et seq., prohibits an employer from discriminating against any employee or potential employee between the ages of 40 and 70 on the basis of age, except where age is a bona fide occupational qualification (B.F.O.Q.) reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

In recognizing the need for a B.F.O.Q. exception, the Congress in both 1967 and 1978, recognized that classifications based on age, like classifications based on religion, sex, or national origin, may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business (H.R. Rep. No. 95-527, pt. 1, p. 2 (1977), Legislative History 362). In addition, the relevant legislative history indicated that the B.F.O.Q. exception was specifically intended to apply "in certain types of particular arduous law enforcement activity where there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs ..." (S. Rep. No. 95-493 (1977) at 10-11 (1977), Legislative History 443-333).

Interestingly, the A.D.E.A., as originally passed in 1967, did not apply to the Federal Government, to the states or their political subdivisions, or to employers with fewer than 25 employees. However, in 1974, the Congress extended the definition of "employer" under Section 11(b) of the A.D.E.A. to include state and local governments. That extension was later tested in the courts in E.E.O.C. v. Wyoming.

Unfortunately, in seeking to prove that their maximum hiring and mandatory retirement age policies are valid B.F.O.Q.'s under the A.D.E.A., the States have found themselves in an adversary position with the Federal Government, i.e., the Equal Employment Opportunity Commission (E.E.O.C.) which apparently rejects any B.F.O.Q. exception to the A.D.E.A. Consequently, numerous, protracted and expensive (costs paid by taxpayers) litigations are occurring across the United States as individual police and firefighting administrators seek to prove that their maximum hiring and mandatory retirement age requirements are indeed B.F.O.Q.'s.

THE FIRST WYOMING DECISION

Congress' extension of the definition of "employer" to cover state and local governments was tested in the courts in E.E.O.C. v. Wyoming. In that case a supervisor for the Wyoming Game and Fish Department was involuntarily retired at age 55 pursuant to a Wyoming statute. He filed a complaint with the E.E.O.C., alleging a violation of the A.D.E.A. The E.E.O.C. filed suit in Federal District Court. The District Court dismissed the suit, holding that insofar as the A.D.E.A. regulated Wyoming's employment relationship with its game wardens and other law enforcement officials, it violated the doctrine of Tenth Amendment immunity articulated in National League of Cities v. Usery, 426 U.S. 883. E.E.O.C. appealed. On March 2, 1983, the United States Supreme Court, in a 5 to 4 decision, ruled that the extension of the A.D.E.A. to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause, both on its face and as applied in this case, and is not precluded by virtue of external constraints imposed on Congress' commerce powers by the Tenth Amendment. The judgement of the District Court, was reversed, and the case was remanded for further proceedings consistent with their opinion.

CHIEF JUSTICE BURGER'S DISSENTING OPINION

When the United States Supreme Court issued its ruling in E.E.O.C. v. Wyoming on March 2, 1983, the court was divided 5 to 4 in its determination. Those dissenting were: Chief Justice Burger, Justices Powell, Rehnquist, and O'Connor.

Chief Justice Burger disagreed with the court's opinion that the constitution allows the Congress to dictate to the states and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. He found it significant that the Congress had not placed similar limits on itself in the exercise of its own sovereign powers. In his judgement, the A.D.E.A. was unconstitutionally applied to the states.

The Chief Justice also felt that the A.D.E.A. would result in increased employment costs due to forced employment of older individuals. He felt that the older employees tend to be at the upper end of the pay scale, therefore, the costs for their wages would be greater. Also, because most pension plans calculate retirement benefits on the basis of maximum salary or number of years of service, pension costs are greater when an older employee retires. He went on to say that the employer is also forced to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher-than-average risk of illness.

Chief Justice Burger also felt that non-economic hardships would be equally severe. For example, employers would be prevented form hiring those physically best able to do the job. Since older workers occupy a disproportionate share of the upper-level and supervisory positions, a bar on mandatory retirement also impedes promotion opportunities. Lack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action goals. He pointed out that the Federal government could not claim that the objectives of decreasing costs and increasing promotional opportunities are impermissible because many of those same goals are cited repeatedly to justify the "enclaves" of Federal exceptions to the A.D.E.A.

Finally, the Chief Justice stated that even if Congress had infinite fact-finding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii or Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states and small, densely populated states to coexist with large, sparsely populated ones.

THE SECOND WYOMING DECISION

The District Court's determination in the first Wyoming case was reversed by the United States Supreme Court on March 2, 1983, and it was remanded for further proceedings consistent with their opinion.

On October 2, 1983, in the United States District Court for the District of Wyoming, a trial by jury in the matter of E.E.O.C. v. Wyoming, commenced. The Honorable Clarence A. Brimmer presided. The issue before the court was whether or not Wyoming's mandatory retirement statute (age 55) for Game and Fish Department employees and members of the Highway Patrol was indeed a bona fide occupational qualification and, therefore, not in violation of the A.D.E.A.

On October 11, 1983, the District Court rendered its decision. The jury found that the mandatory retirement of Wyoming game and fish wardens at the age of 55 was reasonably necessary to the normal operations or essence of the business of game and fish wardens for that state. In addition, it further held that the State of Wyoming had provided a preponderance of evidence that there was a factual basis for believing that all or substantially all persons above the age of 55 would be unable to perform safely and efficiently the duties of a Wyoming game and fish warden.

BONA FIDE OCCUPATIONAL QUALIFICATIONS IN POLICING

It is difficult to separate what is a valid age qualification in policing from what may be simply arbitrary age discrimination. A police officer is expected to respond quickly, physically, and appropriately to an emergency. Law enforcement's response to a challenge of age discrimination has been the defense that police work is often active, physical, and stressful, and it is a logical and necessary part of a successful police personnel program that officers not be past the age of effective physical reaction and performance. The long held adage that a policeman's stock in trade is his ability to respond physically is valid.

The Age Discrimination in Employment Act provides that it is not unlawful for an employer, employment agency, or labor organization to use age limitations "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." This is the B.F.O.Q. exemption under the A.D.E.A. that has been cited as authority for the use of age restrictions in police employment.

In order to assert the B.F.O.Q. defense successfully, the employer must prove (1) that the bona fide occupational qualification is reasonably necessary to the essence of its business and (2) that the employer has reasonable cause based on fact for believing that all, or substantially all of the persons within the class would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to evaluate persons over the age limit on an individualized basis.

In an effort to clarify the B.F.O.Q. exemption to the A.D.E.A., court decisions which have upheld certain mandatory retirement and maximum hiring ages will be briefly discussed. It is recognized, however, that the courts have arrived at different determinations in those areas.

MANDATORY RETIREMENT AGE

Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1967)

> "Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective . . . That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation."
>
> In a per curiam opinion, the court found that the service in the state police is or can be arduous, as it involved participating in controlling prison and civil disorders, responding to emergencies and natural disasters, investigating crime, and apprehending criminal suspects. The existence of a general relationship between advancing age and decreasing physical ability to respond to the demands of the job was recognized, as the court noted evidence supplied by three physicians who testified about the physiological and psychological demands involved in the performance of police functions, the general relationship between aging and the ability to perform under stress, and aging and the ability to perform police functions safely. The court held that "the testimony clearly established that the risk of physical failure, particularly in the cardiovasuclar system, increased with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group."

Mahoney v. Trabucco, 738 F. 2d 35 (1st Cir. 1984), cert. denied 105 S. Ct. 513 (1985)

> The court held that mandatory retirement at age 50 for Massachusetts State Troopers was valid under the A.D.E.A.

Equal Employment Opportunity Commission v. City of Janesville, 630 F. 2d 1254 (7th Cir. 1980)

The court upheld a mandatory retirement age of 55 for all employees in protective service occupations as applied against a police chief. Deferring to the Wisconsin legislature's judgement that "being younger than age 55 is a BFOQ for the generic class of protective service occupations," the court held that public safety is a legitimate state concern.

Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Pa. 1981)

The court ruled that since the mandatory retirement age of 60 for all borough police officers was reasonably necessary to ensure that police officers were in adequate physical condition to protect the safety and welfare of community residents and property, the Age Discrimination in Employment Act was not violated.

Air Line Pilots Association International v. Quesada, 276 F. 2d 892 (2d Cir. 1960)

The court found that the administrator had a reasonable basis for his judgement in promulgating the same F.A.A. regulation, especially in view of the fact that:

Available medical studies showed that sudden incapacitation due to heart attacks became more frequent as men approach age 60 and medical knowledge was such that it was impossible to predict with accuracy those individuals most likely to suffer attacks.

Vance v. Bradley, 440 U.S. 93 (1979)

The Supreme Court was asked to review the constitutionality of a federal statute requiring State Department foreign service officers to retire at age 60.

The opinion noted that the foreign service involves extended overseas duty under difficult and often hazardous conditions and that mandatory retirement "minimizes the risk of less than superior performance by reason of poor health and loss of vitality." Of potential significance is the fact that the court seemed to accept as a valid consideration the fact that Congress as a matter of policy sought to stimulate the highest performance in the foreign service by using mandatory retirement as a means of "assuring that opportunities for promotion would be available despite limits on the number of positions in the Service."

Hodgson v. Greyhound Lines, 499 F. 2d 859 (7th Cir. 1974)

The court found that the human body undergoes physical and sensory changes beginning at around age 35 and such degenerative changes have a detrimental impact on driving skills.

McIlvanie v. Pennsylvania State Police, 6 Pa. Cmwlth. 505, 296 A 2d 630 (1972)

In upholding the mandatory retirement age of 60, the Pennsylvania Supreme Court said:

> The fact that a particular police officer is physically fit and able to perform his duties or that minds may differ upon the particular retirement age selected by the legislature is not proof of want of bona fide as to the qualification otherwise applied uniformly and nondiscriminatorily as to the selected class.

E.E.O.C. v. Pennsylvania State Police, 768 F. 2d 514 (3d Cir. 1985)

Mandatory retirement at age 60 is again being litigated. A trial on the merits is scheduled for April 7, 1986.

MAXIMUM HIRING AGE

E.E.O.C. v. Missouri State Highway Patrol, U.S. Dist. Court for Western Missouri decided December 22, 1982

The court determined that the Missouri State Highway Patrol had proved that their maximum hiring age of 32 is a BFOQ for troopers. The troopers spend almost all of their time doing road work. Though the Patrol requires all of its members to be able to perform all the strenuous physical activities which a trooper encounters daily, the evidence clearly demonstrated that the higher ranking members of the Patrol spend almost all of their time doing administrative work.

The safety patrolman is one who has acquired several years of experience. An experienced patrolman is best able to protect the public and serve as an administrator. It takes approximately eleven years for a trooper to gain sufficient experience to serve the Patrol in an administrative capacity.

Thus, the maximum hiring age requirement of 32 for troopers is a BFOQ.

E.E.O.C. v. Missouri State Highway Patrol, 748 F. 2d 447 (8th Cir. 1984)

The court held the retirement age of 60 and entry age of 32 for state troopers are valid under the A.D.E.A.

Arritt v. Grisell, 421 F. Supp. 800 (D.C. W. Va. 1976)

This case was brought by a 40-year-old man whose application was refused for the position of municipal police officer in Moundsville, West Virginia. He challenged the state statutory age limit of 35 for hiring municipal police officers as a violation of the Age Discrimination in Employment Act. The trial court rejected the idea of strict scrutiny of the legislative classification, holding that governmental employment is not a fundamental right and there was no suspect class of individuals involved. "The statutory age limits on hiring municipal police officers in West Virginia were rationally related to a legitimate state purpose of providing a police service comprised of physically fit members."

Murname v. American Airlines, 482 F. Supp. 135 (D.D.C. 1979)

> The District Court upheld an airline age limitation of 40 on hiring for a flight officer position as a bona fide occupational qualification. The court rejected the challenge of a 43-year-old applicant in view of overriding safety considerations and the long period of training required for advancement to the position of captain. Evidence was presented that pilot error accounts for 90 percent of all aviation accidents. The court concluded that the airline had a factual basis for believing that all or substantially all pilots of an age above 40, at the time of hiring, would be unable to perform safely and efficiently the duties of the job involved, even though no evidence was presented showing that older airline pilots have more accidents than younger ones.

Hodgson v. Greyhound Lines, 499 F. 2d 859 (7th Cir. 1974)

> The U.S. Court of Appeals in the Seventh Circuit upheld refusal of a bus line to consider applications for the position of intercity bus drivers from persons 35 years of age or older. The court found that the human body undergoes physical and sensory changes beginning at around age 35 and such degenerative changes have a detrimental impact on driving skills. "Greyhound need only demonstrate a minimum increase in risk of harm, for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person that might otherwise occur under the present hiring practice.

Usery v. Tamiami Trail Tours, 531 F. 2d 224 (5th Cir. 1976)

> The Court of Appeals ruled against the Secretary of Labor in an ADEA case challenging a 40 year age limit on initial employment as a Trailways intercity bus driver. The court held that the company had satisfied the Weeks-Diaz test.

THE NEW JERSEY PUBLIC'S PERCEPTION OF A TROOPER'S AGE

No empirical data is available which directly addresses the importance of the public's perception of age as a factor in retiring law enforcement personnel; however, comment on the experience of the New Jersey State Police is in order.

The average age of uniform Troopers who respond to calls for service and patrol the highway of this State is between 20 and 35 years of age.

The Division's history of performance for this group has been well accepted by the general population of New Jersey. The majority of our Troopers commence their careers in their early twenties and under our present system leave patrolling functions for specialist or supervisory positions, 7 to 15 years later. The public's perception of the New Jersey State Trooper would thus be bound to fall into a youthful model of man or woman in the 20 to 35 year age bracket. This is not to say that the Division does not have patrolling Troopers in their forties. We do. However, they will constitute a minority when compared with the younger personnel.

It is not so much the youthful picture of strength that I am concerned with. It is the performance of duty that is of paramount concern. By far, it is the patrolling Trooper who engages in the physical contests, for example, subduing bar fights, restraining family feuds, responding to prison riots, civil disturbances, and the many other various acts of violence that the police must contend with.

A review of 1984 New Jersey Uniform Crime Reports, for example, indicates that 88.7% of persons arrested for Part I crimes (murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft), 91.1% of persons arrested for drug abuse violations, and 83.6% of persons arrested for weapons offenses, were less than 35 years of age. In addition, Federal Bureau of Investigation Crime Reports indicate in their "Profile of Persons Identified in the Felonious Killing of Law Enforcement Officers" that during the period of 1975 - 1984, 65.9% of the police killers were 30 years of age or younger; 69.3% had prior criminal arrests.

The "Wyoming" decision will now dictate that we hold no age discrimination for people between the ages of 40 and 70. Thus, we will have to hire Troopers within those age parameters, if they apply, and we will have to assign them to patrolling functions if they successfully complete our Academy. It is the hiring age of 40 to 70 that will potentially create problems for our organization. Given the mandatory retirement age of 70, the added 15 years of service, to our present 55, follows right down the line of career path.

The 20 to 35 year old patrolling Trooper now will move closer to the 35 to 50 year old patrolling Trooper. Therein lies the problem. While individuals may successfully perform in these age brackets, I feel that a majority of patrolling Troopers at age 35 to 50 will experience more physical and medical problems, more injuries, and more lost time to the Division.

We have no statistical evidence of this projection since we have not had a patrolling force of older individuals. At best, we can only judge the future by our past experience and this has primarily been a good experience with younger Troopers. We have been accepted by the public as a first rate police organization and hopefully we will continue in that view.

I feel that the public's perception of the police is an important perception. The entire concept of badge, uniform, and authority deals with perception and is a potent psychological force.

If perceptions did not enter into the law enforcement realm then every law enforcement encounter could lead to an ultimate physical contest. The very term "police force" connotates strength and strength is synonymous with youth in our society.

It is for the reasons mentioned here and the absence of any studies or statistical data that I will advance the proposition that the public is very much concerned with their perceptions of a police officer, as I am concerned. Fielding younger police officers, in their physical prime is more to the advantage of the public than targeting older age groups. I recognize that there is a physical element involved with police work and no matter how small the percentage of time that physical force is needed, that when it is needed, it can mean the difference between life and death or serious bodily injury to the officer or a citizen.

I would submit that in light of these facts, the present established age parameters and career paths of members of the Division of State Police should remain in place.

PERCEPTIONS OF THE NEW JERSEY STATE POLICE RETIREMENT SYSTEM (N.J.S.A. 53:5A-3 et seq.)

In the experience of the New Jersey State Police age/years service retirement is a positive reward and is initially an incentive for employment. This early retirement is perceived by the new employee as compensation for the anticipated demands of this stressful occupation. The new Troopers growth in this organization, and their plans for the future hinge on the stability of retirement at a predetermined point in life. Attractive retirement plans for law enforcement officers have traditionally been viewed as a valid effort to maintain a youthful, vigorous force.

This predetermined point also exists for older members of the Division but depending on their position within the organization, their original perceptions begin to alter.

As they approach the predetermined age/service date, and in conjunction with their position, i.e., rank, job, etc., there is a certain perceived fear of leaving their "home" of 25 years or so. The certainty of early retirement and concomitant job opportunities made available by it, when they were a recruit, now become less important when weighed against the uncertainty of leaving.

Yet the initial perception is in fact what made their personal life and career as dynamic and rewarding as it could be. The constant growth, expansion, and opportunities afforded by the predetermined age/service retirement system compensated for the stressful nature of their occupation. It is extremely stress building and disconcerting to employees who come on a job expecting, quite reasonably, a bright future with many promotions, and are then stymied later in their careers by a court mandated change.

According to the National Advisory Commission on Criminal Justice Standards and Goals, "Police", agencies which require police officers to serve more than 30 years or to attain 55-60 years of age before retirement often are enforcing the continued service of employees who should, for many reasons, be retired. Promotions in these agencies come more slowly than in agencies encouraging earlier retirement, and many employees are just biding their time. The character of such agencies seems to be static, not dynamic, and highly resistant to change. On the other side agencies that permit retirement after 20 years of service, regardless of age, tend to discourage from continued service officers who might otherwise wish to remain with the agency. The value of these employees' training and experience is likely to be lost because they are encouraged to collect their service pension and look to increase their income by offering their experience and training to another employer.

This Division's experience with employment after retirement has been very positive. Most members of this Division are gainfully employed in diverse occupations including other state and municipal agencies, e.g., casino industry, Meadowlands Sports Complex, criminal justice, human services, emergency management, education, etc.

As mentioned earlier, the psychological impact on a retiring member of this Division may be more a perception than a reality. Although there may be a fear and reluctance to separate from the Division because of the uncertainty on the "outside", our experience has shown that former members wishing employment after retirement, are in fact gainfully employed.

The positive or negative impact on the economics of our age/years service retirement system is not determinable at this time, however, certain expert opinions must be considered.

In rendering his concurring opinion in Equal Employment Opportunity Commission v. Wyoming, Justice Stevens felt it necessary to write his appraisal of the larger perspective:

> "I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits."

Voicing a similar opinion Peter Gorman, Supervising Research Analyst for the New Jersey Division of Pensions, states that "abolishing mandatory retirement rules would lead to bigger pension bills in the future."

NEW JERSEY STATE POLICE AFFIRMATIVE ACTION GOALS

In October of 1975, the New Jersey State Police entered into a consent decree with the United States government. The object of this agreement was to increase the proportion of minorities and women within the Division of State Police.

Prior to 1975, the Division of State Police had 19 minority and no women Troopers. Subsequent to our consent agreement, the Division's minority and women complement now totals 244 (196 minorities and 48 females). It is not without difficulty that we had advanced to this point. It has taken us approximately eleven years to overcome many developmental problems, adverse impacts on minority groups, and so on.

I believe that a nullification of the New Jersey State Police mandatory retirement system will serve to accomplish the following:

1. Seventy years of age being the lower limit of mandatory retirement, personnel will extend their careers past the 55 years of age (the N.J. State Police Retirement System presently mandates retirement at age 55) to the 70 age limit, a full 27.2% increase in age mandates. This will serve to create fewer retirements over the next 15 years.

2. Fewer retirements will not deplete the Division's authorized strength to the point which has historically allowed for one or two recruit classes per year.

3. Diminished position openings means fewer job opportunities and the resultant adverse impact on minorities and women. In recent application of our consent agreement we have advanced the spirit of that agreement to the extent that the State Police recruit training classes are made up of at least 33-1/3% minorities and women.

Finally, I see the "full and immediate" application of the A.D.E.A. to the New Jersey State Police as having a detrimental effect on affirmative action with the employment and promotional opportunities for minorities and women being diminished by the interruption and extension of the hiring and retiring cycle that formerly existed within our Division.

NEW JERSEY STATE POLICE MANDATORY RETIREMENT B.F.O.Q. AND LITIGATION

Following the repeal of our mandatory retirement statute, the New Jersey State Police, with the legal assistance of the Attorney General, initiated a study to determine whether a factual basis existed to establish an age-specific retirement provision for the State Police under the B.F.O.Q. exception. As part of that study, two cardiologists, two physiologists, and a cardiologist who is also a physiologist, were consulted. That study, "Report on the Establishment of a Mandatory Retirement Age as A Bona Fide

Occupational Qualification," dated December 19, 1984, concluded that a compelling factual basis exists to believe that all or substantially all persons aged 55 and over are unable to safely and efficiently perform State Police duties and that it is impossible or impractical to determine the continued fitness of individuals over that age on an individualized basis. With the approval of Governor Thomas H. Kean, mandatory retirement legislation was introduced. The New Jersey State Legislature held hearings, considered, and subsequently passed a statute establishing the requirement that all members of the State Police, other than the Superintendent, retire as of age 55. The legislation specifically found and declared that retirement at age 55 constituted a B.F.O.Q. reasonably necessary to the continued health and fitess of the members of the State Police, and that such ongoing health and fitness was required for the safe and efficient protection of the public.

With the enactment of mandatory retirement legislation, E.E.O.C. filed suit against the New Jersey State Police alleging its mandatory retirement statute violated the A.D.E.A. E.E.O.C. sought a preliminary injunction which, if it had been granted, would have prevented that State Police from retiring its officers at age 55. On August 8, 1985, the Honorable Mary Anne Trump Barry, Federal District Court of New Jersey, following a *twelve-day* hearing, denied E.E.O.C.'s application for a preliminary injunction. Judge Barry determined that the State Police would likely succeed during the future trial on the merits and that E.E.O.C.'s clients would not be irreparably harmed as a result of the injunction not being issued. During this hearing, *six* expert witnesses testified of behalf of E.E.O.C.; *three* testified for the State.

On March 11, 1986, a trial on the merits began in the Federal District Court for New Jersey; Judge Mary Anne Trump Barry, presiding. The New Jersey State Police is seeking to prove that its mandatory retirement statute is a valid B.F.O.Q. exception under the A.D.E.A.; E.E.O.C. will attempt to disprove its validity. Interestingly, E.E.O.C. has retained (at taxpayer's expense) another five expert witnesses (statistician, criminologist, industrial psychologist, exercise physiologist, and cardiologist).

The monetary costs to the taxpayers of New Jersey for the State Police mandatory retirement study and subsequent litigation will be approximately $150,000. .

SUMMARY

In 1974, the Congress extended the provisions of the A.D.E.A. to state and local governments. That extension did not pertain to certain Federal employees, for example, the Federal Bureau of Investigation, Foreign Service, and the military, etc. They remain exempt from the age parameters set forth in the A.D.E.A. On March 2, 1983, the United States Supreme Court decided the case of E.E.O.C. v. Wyoming. They ruled, in a 5 to 4 opinion, that Congress had the constitutional authority to extend the A.D.E.A. to state and local governments. The court rejected the states' rights issue offered by the state of Wyoming.

Since the Wyoming decision, many police and firefighting administrators have been faced with suits pertaining to their maximum hiring and mandatory retirement ages. Some have been successful in defending their age policies; others have not. Additional age discrimination suits are likely. These suits are costly, time-consuming, and a drain on each organizations resources. In my judgement, it is unrealistic to expect each state, county, and municipal police and firefighting organization to go to court to establish their maximum hiring and mandatory retirement age B.F.O.Q.'s. The time and expense would be overwhelming. I do not believe that was Congress' intent when they extended the A.D.E.A. to the states.

Therefore, the most effective way to remedy the age discrimination issue, in my opinion, is for the Congress to return to the states the exemption to the A.D.E.A. that they enjoyed between 1967 and 1974; the same exemption that certain Federal employees still enjoy as was cited by Chief Justice Burger in his dissenting opinion in E.E.O.C. v. Wyoming.

My efforts in seeking this amendment to the A.D.E.A. for law enforcement officers and firefighters is solidly supported by the National Governors Association, National Association of Attorneys General, International Association of Chiefs of Police, National Sheriffs Association, the National Troopers Coalition, and others.

As Superintendent of the New Jersey State Police, and on behalf of the State and Provincial Division of the International Association of Chiefs of Police, and the International Association of Chiefs of Police, I respectfully solicit your support for S.698 and H.R.1435 which are bills to amend the A.D.E.A. of 1967 to exclude from the operation of such Act matters relating to the age at which individuals may be hired, or discharged from employment, as firefighters and law enforcement officers by states and political sub-divisions of states.

Senator **Nickles**. Thank you very much, Mr. Pagano.

You mentioned your court case and I think I heard you say, what $150,000 has been expended so far and you are not through yet?

Colonel **Pagano**. That is correct, plus thousands of man-hours, attorney hours, testing hours, my hours. There is an inordinate amount of time involved in this kind of administration and we are paid to protect the public, not to protect ourselves. We have pension programs that pay our people to leave and go to other employment so that these kinds of problems do not have to be——

Senator **Nickles**. Was $150,000 a fee in addition to your salary and the other salaries that have been expended?

Colonel **Pagano**. It included on a prorated basis my salary, the salaries of our attorneys and the salaries of other enlisted people involved. It has to do with hard dollars spent on costs along the way, including—and I would like to point this out, when you speak about physical standards—you cannot send a man out to take a physical fitness test unless a doctor says he can take it.

In the first year of providing medical examinations to our troopers, the State of New Jersey spent $276,000. This year the medical examinations which are given prior to the physical fitness test, is going to cost us over $400,000. That is a wise expenditure of State funds.

Senator **Nickles**. Are those examinations just for your senior people who would be working beyond age 55, or is that for everyone?

Colonel **Pagano**. It is for everyone, because when you look at the ADEA and setting standards and keeping within the guidelines of the ADEA, you have to be absolutely nondiscriminatory. That means that those standards have to be equally applied across the work force and that is expensive. Again, just the cost this year is $400,000 for those medical examinations. This is in addition to the cost of man-hours in looking at how these tests are administered because we have had to bring a total staff, probably six people at this point in to work full time on the adminisitration of these standards.

Senator **Nickles**. Mayor, you are mayor of Goshen with a population of about 20,000?

Mayor **Chiddister**. Yes.

Senator **Nickles**. Do you have a retirement age in your city police force of 55 or what?

Mayor **Chiddister**. Twenty years or 55, whichever comes last.

Senator **Nickles**. Whichever comes last, 20 years and 55 and out.

Mayor **Chiddister**. Right. It was but, of course, that has been changed.

Senator **Nickles**. Okay. Have you found people staying beyond age 55 now?

Mayor **Chiddister**. We have not experienced that yet, but we are nearing, we have some officers who are getting near that age and we do not know what is going to happen yet.

Senator **Nickles**. You found that in Indianapolis?

Mr. **Buckler**. Yes. What has happened with the city of Indianapolis is that there is—Chief Mackatee of the Indiana Police Department has said that yes, there are some individuals who work over

55. Indianapolis is a peculiar situation in that it allows team policing, something that the cities of Goshen, Linton, Indiana, and Kokomo do not have available to them.

I do not want to take any more of your time, but Colonel Pagano raised an interesting point. In the *Tennessee* decision he mentioned that Colonel Ferguson was allowed to testify through the use of that evidence. In Indiana, we had recognized Colonel Ferguson as our expert and, unlike the situation there, we were not allowed to use him. The court decided that he was unavailable, since he was with the Air Force and the Air Force JAG said he could not testify, he would not be available to us, even though he had come to Indiana, had looked at our department and rendered an opinion.

The Tennessee District Court's March 7 decision—it issued two decisions. One was based on establishing the BFOQ for conservation officers down there, but the attorney, Mary Walker, also sent to me another decision that the court rendered concerning Colonel Ferguson solely and that was that the Tennessee District Court had ordered the EEOC attorney to find out why Colonel Ferguson was not available. The attorney reported to the court in Tennessee that the central office in Washington, DC knew nothing about it, but in talking to the EEO officer in Indianapolis, in the case of *EEOC* v. *Indiana State Police*, the EEOC attorney in charge of that case had called the Air Force to stop Ferguson from testifying.

We submit that we should be allowed to defend our laws with experts, medical experts, were they be State or Federal. We are not interested in the Stealth bomber. We only wanted to have a medical opinion from Colonel Ferguson and, unlike our friends in New Jersey and Tennessee, we were not able to have that testimony.

Senator NICKLES. Thank you all very much for your appearance before the committee.

The next and final panelist is Louis Grossi, a member of AARP, from New Jersey.

You may proceed.

STATEMENT OF LOUIS E. GROSSI, MEMBER, AMERICAN ASSOCIATION OF RETIRED PERSONS

Mr. GROSSI. Mr. Chairman and members of the subcommittee, I am Louis E. Grossi, a former major with the New Jersey State Police, and president of the State Police Against Age Discrimination, Inc. I thank you for this opportunity to speak on behalf of the American Association of Retired Persons and indeed on behalf of all police officers who wish to continue working past mandatory retirement ages that may be younger than 70.

I am proud to be a member of AARP which, with approximately 22 million Americans over the age of 50, is the largest membership organization in the country. I am also proud to be one of the highly trained persons who for 30 years was responsible for the safety of the citizens of the State of New Jersey.

I want to tell you a bit about my career with the New Jersey State Police and then will discuss the reasons why AARP and I oppose any attempts to deny State and local public safety officers the protections of the Age Discrimination in Employment Act.

I enlisted in the New Jersey State Police 31 years ago. On August 30, 1985, having risen to the rank of major and holding the position of supervisor of the records and identification section, I was forced to turn in my badge, my gun and other equipment. I left a job I loved and consistently performed with excellence.

I did not understand then and I do not understand now why I was considered to be no longer capable of performing my job. I began my career as a road duty trooper. I was subsequently assigned to be an investigator with the narcotics squad where I served in an undercover capacity. The State of New Jersey then requested my assistance in establishing the first State-operated drug enforcement training school in the United States. I developed the program, lesson plans and curriculum and ran the school for 7 years. To date, this school has trained over 25,000 police officers from all around the country. This school has become a model for others of its type in the United States.

In 1976 I was promoted to Lieutenant in the criminal investigations section. During this period, I received special commendations from the Federal Drug Enforcement Administration and the State for the training of officers and for participating in an investigation that produced the largest seizure to that date of brown heroin in the United States.

After a period as director of instruction for the New Jersey State Police Academy, I was promoted to Captain in 1979. In 1981 I was promoted to Major and made Supervisor of the State Records and Identification Section, the last position I held with the department.

During my years on the force, I also completed my formal education. I received a bachelor of arts degree in political science and a Masters degree in education and sociology. I am a certified teacher and a licensed real estate sales associate, but nothing has ever come close to the satisfaction I derived from being a police officer.

I joined the police force for a simple reason: Instead of complaining about society's ills, I wanted an opportunity to do something about them. I also wanted a varied and challengi:ng career. The numerous commendations I received in my career are an indication of the mutual esteem in which the department and I held each other.

When I was forcibly retired in 1985, with no consideration for the experience, knowledge and ability I developed, no recognition of my commitment to this profession and disregard of my high level of physical and emotional fitness, the door slammed shut on the largest and perhaps the most important part of my life outside of my family, with no reason.

I have seen the same thing happen to many of my colleagues. They were good police officers one day and unemployed the next. These people were at their peak, but now have nowhere to contribute their experience and energy.

In my position as president of State Police Against Age Discrimination, I have discovered that most officers are unable to understand being shelved while still clearly as to find any real substitute for being police officers. I am not talking just about the obvious losses of salary and status; I am talking about being told at the young age of 55 that you are too old to do a job you still do well.

I, together with a number of my colleagues, decided to fight the state's arbitrary decision to retire—or better to say fire—us without any cause. In May 1985, the Equal Employment Opportunity Commission, having found that the State violated the Age Discrimination in Employment Act, filed our lawsuit.

The State of New Jersey had not even attempted to assess the health and fitness of any of its individual officers prior to our filing this lawsuit, except for annual and cursory physical agility tests. And, by the way, I passed every test every year. Officers over the age of 50 were not required to take the physical agility tests.

Mandatory retirement at age 55 for local and State police cannot be justified on legal grounds, on blanket medical grounds, or on the State's purported inability to assess any individual officer's fitness.

First, the basic premise of the Age Discrimination in Employment Act is that each person is entitled to remain a productive and wage-earning member of society until the age of 70 unless he or she individually is shown to be incompetent at an earlier age. Consistently over the past two decades, public opinion polls have overwhelmingly supported this view. In 1981, 90 percent of the American public believed that mandatory retirement was wrong.

Similarly, police departments around the Nation, including many if not most of the local governments and police departments in New Jersey, support elimination of mandatory retirement at age 55. Contrary to what you have heard today, I have received letters, and I submit them for the record, from police chiefs organizations in New Jersey, from individual policemen in New Jersey and police chiefs themselves in New Jersey who have opposed any efforts on the State level to require mandatory retirement.

Notwithstanding the fact that local police perform a much more physically demanding and dangerous job than State troopers, local police even in New Jersey may work until age 70.

Second, an abundance of scientific evidence exists showing that chronological age is a bad indicator of job performance. Other factors, such as aerobic and muscular fitness and amount of body fat, are much better. The State of New Jersey, however, continues to rely upon age and does not even consider the many factors that doctors believe lead to disabilities such as coronary artery disease.

The State's argument that public safety requires it to retire older police officers does not hold water when you consider that, prior to the filing of our lawsuit, New Jersey did not medically test any member of its State police force. Younger officers who, because of individual characteristics were highly prone to disease, were thus allowed to remain active. Such officers clearly pose a greater risk to public safety than fit older officers. Research overwhelmingly indicates that emotional maturity, self-restraint, resourcefulness, increased analytical capacity and flexibility are far more important than, for example, sheer physical prowess for competent police work.

Furthermore, senior members of the force–that is, officers who have been with the force in excess of about 10 years– almost universally hold administrative or other supervisory positions. Desk jobs, as it were. Few, if any, of these officers are doing physically active and arduous police work. They are not exposed to the daily risks confronting the patrol force. Instead, their expertise and knowledge is used to run the department.

Police departments that retire their senior officers are, in effect, getting rid of their most experienced and competent professional personnel. The negative impact of mandatory retirement on the professionalism of police departments in this country is an issue that must not be ignored by Congress when considering proposals such as those presented by Senators Bradley and Ford.

Finally, New Jersey and other States can no longer argue that it is impossible or unfeasible to individually test police officers. As discussed in more detail in AARP's written statement, numerous cities have successfully implemented fitness and testing programs. These tests not only accurately assess individual competence and fitness, but are relatively inexpensive and actually result in savings for cities and States in disability costs. These programs have been well-received by rank-and-file officers and no adverse effects have been reported. One outcome of these fitness tests, by the way, has been that older public safety officers demonstrate much better health and fitness profiles than out-of-shape younger officers.

The experience of the majority of the major cities in the United States proves that mandatory retirement at age 55 is not necessary to protect the public safety; rather 'annual medical, physical, and psychological testing is.

In a study of police departments in the 100 largest cities in the United States, it was found that only 3 percent had a retirement age of 55; 43 percent had age 65; 17 percent had no mandatory retirement age at all.

Senator NICKLES. What group is that?

Mr. GROSSI. The last group, sir?

Senator NICKLES. That was surveyed on what?

Mr. GROSSI. I do not understand your question.

Senator NICKLES. You mentioned a survey that projected a small percentage had 55 and a larger percent had 65?

Mr. GROSSI. Yes, sir.

Senator NICKLES. What was that?

Mr. GROSSI. And 17 percent had no mandatory retirement at all.

Senator NICKLES. Is that a police group or what?

Mr. GROSSI. Police, yes, sir.

Senator NICKLES. OK.

Mr. GROSSI. As noted above, even in New Jersey local police officers are permitted to work until age 70. Even those law enforcement divisions that are managed by the New Jersey State Police permit their officers to work until age 70.

In the United States, we have rejected the notion that older workers may be pushed aside simply to make room for younger workers. In light of the fact that public safety is not served by arbitrarily retiring competent and fit employees, it must be assumed that enhancing the career mobility of younger officers is the primary reason for the attempts to get rid of older police officers.

I and AARP do not under any circumstances want to force states and cities to retain unfit officers. The Age Discrimination in Employment Act does not require that. All the law requires is that an employer not rely upon discriminatory, invalid and costly ideas of age-based incapacity. I and AARP urge you to reject any legislation that would permit this.

Thank you.

[The prepared statement of the American Association of Retired Persons follows:]

STATEMENT OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS
ON AGE DISCRIMINATION IN EMPLOYMENT
AND STATE AND LOCAL PUBLIC SAFETY OFFICERS

before the United States Senate Committee on Labor and Human Resources
Subcommittee on Labor
March 18, 1986

The American Association of Retired Persons counts among its more than 22 million members above the age of 50 approximately 5 million persons who are actively employed. A significant number of our working members are employed by state and local governments. On behalf of these members, and all older persons who work or wish to work, AARP urges the Congress to reject any attempts to further limit the protections of the Age Discrimination in Employment Act (ADEA) for older workers.

AARP has as one of its goals the elimination of stereotypical beliefs about the capabilities and competency of older persons, particularly those who work. Current legislative proposals to permit states and local governments to mandatorily retire police and firefighters are based solely upon generic and unproven misperceptions about the capabilities of older workers that have been rejected by Congress in passing the ADEA and are disbelieved by the nation as a whole. Such discrimination is contrary to the principle of equality of opportunity; is a waste of the valuable talents of skilled and proven workers; and is costly to both the employer and the national economy.

One argument used to support exemptions from the ADEA for state and local public safety employees is that it is not possible to test older workers for their physical fitness as firefighters and police officers. Recent U.S. Supreme Court cases and the experiences of state and local governments refute this notion. An abundance of scientific evidence exists showing that chronological age is a poor indicator of job performance. Other factors, such as aerobic and muscular fitness and amount of body fat, are much better predictors of performance than age. In *Johnson v. Baltimore*, the Supreme Court specifically held that such individualized testing is possible, practical and desirable for public safety officers of all ages.

The experience of the Los Angeles Fire Department is a case-in-point. Los Angeles set up a physical fitness training program for about $5,000 for 120 work locations and spends about $5,000 annually to maintain it. The cost of periodic fitness testing is between $150-$200 per employee. Research on this program has shown that:

- it is possible to effectively test for an individual firefighter's fitness for the job;
- through medical examinations and physical fitness testing and training the fire department has increased fitness levels and reduced risk factors associated with heart disease;
- the fitness program has played a major role in reducing injuries occurring on duty; and
- the fitness program is cost-efficient.

Front-line firefighters in Los Angeles - and in the many many other states and cities that have instituted similar testing programs (such as Alexandria, Virginia; Dallas, Texas; St. Paul, Minnesota; New York City) - can and do pass physical fitness tests and medical examinations. Other testing done by Dr. Paul Davis, an exercise physiologist who has worked for the FBI, the U.S. Fire Administration, the U.S. Marines and the Secret Service has proven that many physically fit older public safety officers demonstrate much better health and fitness profiles than out-of-shape younger officers. And, it is important to note that the City of Baltimore, the defendant in the Johnson case, had no annual fitness and health testing program whatsoever for any of its employees.

Individual testing programs have proven to be cost-efficent, not costly for those cities that have instituted them. In return for the costs incurred by the City of Los Angeles, noted above, the program has been estimated to have signficantly cut-back on worker-related disabilities which would have cost the City an average of $250,000 annually. The City of Alexandria, Virginia, has estimated that its fitness program will result in fewer disability retirements, reduced loss-of-time accidents, less use of sick and disability leave, and a healthier, more efficient department. Indeed, research by Isidore Silver and Edith Flynn found that older police officers generally, regardless of whether they participated in a fitness program, have a lower rate of civilian complaints, absenteeism, and turnover. Because the age of police and firefighters contributes to their knowledge and skill on the job, statistics reveal that as age increases among firefighers, injury rates go down. Furthermore, it is misleading to characterize the jobs held by most older police officers and firefighters as unduly arduous. Older workers in these professions have often risen to administrative ranks within the employment structure and have jobs that require relatively little physical effort.

Another argument used to support these proposed exemptions from the ADEA is that the federal government exempts its own public safety officers from the ADEA and requires certain of them to retire at ages signficantly younger than 70. The history of this exemption shows that it was not based upon an assumption that older public safety officers are less competent. To the contrary, the federal exemption initially began as an option for early retirement offered to federal employees in dangerous jobs, when those jobs were signficantly more physical and dangerous than they are today. Fewer than half of the federal agencies permitted to set lower-than-70 retirement ages choose to do so, because it needlessly eliminates knowledgeable, valued and effective employees. This is buttressed by a recent report by the General Accounting Office criticizing age limitations for federal public safety workers, stating that age is poor predictor of physical or mental performance. Legislation has been introduced that would eliminate both maximum hiring ages and mandatory retirement for federal occupations not presently covered by the ADEA. Rather than following the lead of the federal government, which even the federal government agrees is outdated, the states themselves should take the lead on this issue and support legislation eliminating the federal exemptions.

Finally, the states and Congress must recognize that there are significant costs associated to their economies associated with early mandatory retirement. In addition to the contributions made by experienced and skilled workers, increased employment generates additional tax revenue for use at all levels of government; it eases the strain on the Social Security trust fund by increasing the income to, and decreasing the payout from, the fund; and older persons who work are less likely to need the benefits provided by government-subsidized economic transfer programs. Workers are able to maintain their standard of living with a form of income - wages - that has better prospects for keeping up with inflation.

The real dollar cost to society of forced retirement increases as the age of retirement decreases. The most pertinent example is the case of retirement income programs, including state, local and private pension plans as well as Social Security. Although older workers may get paid more, and may accrue increased benefits, these very speculative costs are outweighed by a number of economic factors. First, these same older workers, as long as they remain employed, are not being paid any pension benefits but instead continue to contribute to the fund. Second, when they do retire they will likely, as an actuarial matter, receive benfits for a fewer number of years than those workers who retire at earlier ages.

The federal government has estimated the costs and benefits to it alone of the early retirement of state and local police and firefighters, of whom approximately 30% now participate in the Social Security program. The federal government's analysis is equally valid for state and local government pension programs. Based upon the average income of $23,500 received by state and local public safety officers, if every one of them works until age 70, rather than being forcibly retired at age 62, the government will collect more than $35,000 in additional payroll taxes from each worker. It will have paid out almost $100,000 less in benefits, representing a savings of almost $135,000 per worker. If every worker works only until age 65, the government will still collect $10,000-$11,000 additional per worker in payroll taxes.

When these figures are tabulated for all officers and firefighters over age 55 (rather than 62) who are covered by Social Security, the savings are even greater. If all of them work until age 70, the government will collect an additional $1.4 billion in payroll taxes and pay out $4.5 billion less in benefits - a total savings of $5.9 billion. If the whole group retired at age 65, the total savings to the Social Security trust fund would be $1.6 billion.

In these days of grave concern over the future liquidity of the Social Security system and other governmentally-supported pension and social service programs, it is inconceivable that we should force able and enthusiastic workers to cease being active contributors to these programs and instead become active beneficiaries.

Mandatory retirement has the worst and most immediate financial and emotional impact upon the unemployed individual. Retirement generally brings a sharp decrease in income which, because of the extraordinarily limited employment opportunities for older persons, may last the rest of their lives. This problem is compounded for persons like firefighters and police officers who have spent their entire working lives in jobs that have no counterpart in the private labor force. It is no answer for a highly skilled police office to become a night security guard in an office building. Nonetheless, the stories are legion of forcibly retired police and firefighters who are unable to find similar employment in other cities - because of hiring age limits.

Unemployment can change an older adult from a social and economic asset to a liability, particularly if that person has had a physically active job. Many eventually stop looking for work and cease to be represented in statistics recording the unemployed. In the case of forcible retirement at age 55, we are talking about someone who can be expected to have 15 or more years of productive work left. Such a person, who may typically have children in college and mortgage payments, cannot economically survive on a reduced pension-income.

It must be stressed that the ADEA does not require that states and cities retain unfit public safety employees. It simply refuses, with good reason, to permit any employer to rely upon incorrect and costly notions of age-based incapacity. State and local governments are proposing to sacrifice their most experienced and knowledgable personnel on the basis of invalid and misperceived notions of the competence of their older workers. No economic or social justification can support this proposal. Americans of all ages have indicated their overwhelming support for the elimination of age-based employment discrimination in any form. Police officers and firefighters, who sacrifice much to ensure the safety of all, must retain the basic right to remain productive members of society in their chosen profession to the same degree as all other persons. AARP urges you to reject any legislation that would infringe upon this right.

(EDITOR'S NOTE: Due to printing limitations and in the interest of economy, appendix material accompanying this statement was retained in the files of the committee.)

Senator **NICKLES**. Mr. Grossi, thank you for your comments.

Basically, I think the thrust of what you are saying was favored testing but not any age limitation.

Mr. **GROSSI**. That is right, sir. If a man can pass the test and is phycially able to do the job, he should be retained.

Senator **NICKLES**. I think I understood from Mr. Pagano's statement, and I believe it would be correct to say that if you are going to do testing, because of the Age Discrimination Act, you would have to test everyone. In other words, you could not confine the tests to those persons who are, say, above the age of 45, you would have to test the entire work force, is that correct?

Mr. **GROSSI**. That is right, sir, and we agree with that. Everybody should be tested, but New Jersey historically since 1921 never required anybody over 50 to take a physical test so they have no data base for what a person 50 years or over can or cannot do. They never required it.

Senator **NICKLES**. I am assuming that testing would apply as well to the desk jobs?

Mr. **GROSSI**. Every job, sir. When I say physical testing, I mean physical testing. New Jersey historically has never medically tested annually.

Senator Nickles. I am not talking about that. I am just thinking of the process, because you mentioned the desk jobs and you mentioned the possibility, and I have this image in my mind of "Hill Street Blues" and the overweight sergeant, you know, that makes the movie.

Mr. **GROSSI**. That is the image that we suffer from television. I am not a pot-bellied old man that cannot run a mile and a half in 12.5 minutes, and we in the desk jobs have a feeling of tradition in New Jersey State Police.

Senator **NICKLES**. I am sure there are people in desk jobs that are in that situation.

Mr. **GROSSI**. And there are a lot of people on patrol forces that are also, sir.

Senator **NICKLES**. That are?

Mr. **GROSSI**. Yes, sir. And when I say out-of-shape younger officers, I mean in my department also.

Senator **NICKLES**. What about the possibility of a stricter bill than proposed that would not apply an exemption strictly to State and locals dealing with the hazardous occupation but defining hazardous occupation as strictly those who were on the street, in other words excluding the desk-type jobs?

Mr. **GROSSI**. Well, those people that are on the street want to move up and eventually they move up. It is not just something that is stationary. They all move there, and I do not think that we should discriminate between the hazardous and the non-hazardous. If a man is able to do his job and he stays physically fit or she stays physicall fit, as we have today, then they should be subjected to the test.

Senator **NICKLES**. You do not think any change would be in order whatsoever?

Mr. **GROSSI**. I do not think any change——

Senator **NICKLES**. You do not think any change would be in order.

Mr. Grossi. I think the Federal Government should consider abolishing its age of 55. I think Justice Marshall in his decision in *Johnson* v. *Baltimore* said that 55 was an incentive, not because of age and capability and that was a unanimous Supreme Court decision.

Senator Nickles. Is the system in New Jersey directed towards age 55 retirement?

Mr. Grossi. Historically it was never a stationary 55. In fact, in the late sixties they changed it to 65. There has never been a tradition of 55. In fact, the person could come in the New Jersey State Police at 35 years old and work 25 years, and for years we had many people working over age 55 that did their job very well, who approached 60 and then retired. As a matter of fact, since 1983, after the Supreme Court decision and our Attorney General ruled the law invalid, there were 76 voluntary retirements and they did not have to go and 266 promotions. We stopped nobody. Human nature is what it is. People will go when they want to go.

Senator Nickles. What percentage of the people would stay?

Mr. Grossi. Those who would continue to work and——

Senator Nickles. What percentage?

Mr. Grossi. A large percentage.

Senator Nickles. How many? Do you happen to have that?

Mr. Grossi. Well, of the 62 men that went out with me, I would venture to say that better than 50 wanted to stay.

Senator Nickles. You were at what age when you were forced to retire?

Mr. Grossi. 56, sir.

Senator Nickles. 56. I thought you said it went to 65.

Mr. Grossi. Well, we turned it back to 55 in the late seventies, so there was a period in New Jersey when it was 55, 65, 55, so it was a tradition that when you knew when you came in that you had to leave at a certain age. They changed it and they are still changing it.

Senator Nickles. What is it today, 70?

Mr. Grossi. Well, the Governor signed the law I think at 55, and that is why we are in court. We changed——

Senator Nickles. And that court case is pending today?

Mr. Grossi. Yes, sir, and I would like to clarify another issue here. Colonel Ferguson was not restricted from testifying last week in the District Court. It was because they thought his testimony in July would be redundant and that he had nothing new to offer and that was the objection of the EEOC, not because we did not hear what he had to say. We already heard what he had to say.

Senator Nickles. Thank you very much for your testimony.

I wish to announce that the record will remain open for an additional two weeks.

[Additional material submitted for the record follows:]

JOINT PREPARED STATEMENT
BEFORE THE SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES

MARCH 18,1986

THE HONORABLE MATTHEW J. RINALDO AND WILLIAM J. HUGHES

Mr. Chairman, Members of the Subcommittee, we welcome this opportunity to submit written testimony in favor of S. 698, the "Age Discrimination in Employment Act (ADEA) Public Safety Officers Amendments of 1985". Identical legislation that we introduced in the House, H.R. 1435, now has 79 co-sponsors and enjoys broad bipartisan support from Representatives from more than half the states.

S. 698 and H.R. 1435 would amend the ADEA, an Act which prohibits discrimination against most workers between the ages of 40 and 70, by granting to states the flexibility currently enjoyed by the federal government to set mandatory retirement ages for state and local fire fighters and law enforcement officials. These bills were prompted by the 1983 Supreme Court decision, EEOC v. Wyoming, which held that the ADEA applies to state and local governments.

As senior members of the House Select Committee on Aging, we wish to stress that we strongly oppose age discrimination. Ability, not age, should be the criterion used to obtain and retain a job. In 1978, Congress removed the upper age limit in the ADEA for federal sector employees. Congress should enact similar legislation for private sector and state and local government employees, so that everyone is protected from arbitrary age discrimination, particularly in the area of mandatory retirement.

It is our firm belief, however, that certain occupations which affect public safety--positions such as law enforcement and fire fighting--deserve special attention. Indeed, Congress has ratified our viewpoint by permitting federal agencies to establish minimum and maximum entry ages for federal law enforcement officers and fire fighters and by retaining existing federal legislation setting forth specific mandatory retirement ages for federal public safety officers.

Congress Has Recognized That Certain Age-Based Classifications Are Legal and Appropriate

The ADEA does not prohibit all age discrimination in employment. For example, under Section 12(c) of the Act, individuals may be required to retire at age 65 if they are entitled to at least $44,000 in annual pension income upon retirement from a "bona fide executive or high policy-making position."

Similarly, when Congress extended ADEA protection to workers between the ages of 65 and 70 in the 1978 ADEA amendments, it recognized the unique situation of colleges and universities and permitted a five-year grace period for tenured college faculty.

More importantly, while Congress in effect abolished mandatory retirement for most federal employees under the ADEA, it left intact federal laws permitting federal agencies to establish mandatory retirement ages and minimum and maximum hiring age limits for public safety officers. Federal law enforcement and fire fighting personnel must retire at age 55; federal air traffic controllers must retire at age 56; foreign service officers must retire at age 65, and certain Central Intelligence Agency employees must retire at age 50. The Federal Aviation Administration requires that commercial airline pilots retire at age 60.

The legislative history of the ADEA reveals that Congress recognized the decline of certain mental and physical capabilities with age so that, for public safety considerations, a mandatory retirement age limit may be justified for jobs with high physical demands. Thus, in 1978, at the same time Congress increased protections for older workers under the ADEA, it also endorsed the concept that public safety officers may reasonably be subject to retirement age limits unlike other occupations:

> For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.
>
> S. Rep. No. 95-493, 95th Cong., 2d Sess. at 10 (1977).

Similarly, when hearings were held on proposals to amend the ADEA (H.R. 5383), now law, the House Education and Labor Committee reported that:

> ...it is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining older workers. For example, jobs such as some of those in air traffic control and in law enforcement and in fire fighting have very strict physical requirements on which the public safety depends.
>
> H. Rep. No. 95-527, 95th Cong., 1st Sess. (1977).

It is highly significant that at the time the upper age limit for most civilian federal employees was completely eliminated, Congress chose to continue in effect retirement age limits for federal safety officers. In light of the treatment accorded federal public safety officers and fire fighters, we believe state and local governments should have the same flexibility to determine appropriate ages for their own public safety personnel. There is no justification for applying one standard to federal public safety personnel and another to state and local public safety personnel.

It is discriminating and arbitrary to make the applicability of the ADEA to a public safety officer depend on whether that officer is employed by the federal government or a state or local government. In fact, some federal public safety activities may be substantially less arduous than those carried out by state and local personnel. In a hearing addressing mandatory retirement policies for law enforcement officers, fire fighters and air traffic controllers, the Department of Defense reported to the Subcommittee on Compensation and Employee Benefits of the House Post Office and Civil Service Committee that state and local fire fighters face 13 times more risks than Department of Defense fire fighters. (Comm. Ser. No. 95-51, 95th Cong., 2nd Sess. at 13 (1977)).

Distinguished medical experts have testified to Congress that medical science and technology have simply not advanced to the point where we can safely remove age limitations and rely exclusively on individual testing. For example, in a recent hearing conducted by the House Aging Committee addressing age discrimination and the FAA Age 60 Rule, Dr. Donald E. Flinn of Texas Technical University Health Sciences Center reported that "a uniform age at which all airline pilots should retire is necessary, since no age related psychophysiological index of intellectual and psychomotor functions exists at present." (Comm. Pub. No. 99-533, 99th Cong., 1st Sess. at 148-150 (1985)).

Colonel Earl W. Ferguson, M.D., Ph.D., a former surgeon and military consultant to the Surgeon General, United States Air Force for Medicine, Cardiology and Physiology, reported:

> ... fire fighters above the age of 55, who may be required to exert themselves maximally as part of their job, are highly likely to have significant coronary artery disease which cannot be detected by...testing. Not only is their ability to perform a given amount of work decreased, but their chance of being incapacitated and unable to perform their job at a critical phase is increased greatly. Requirements for fire fighters to retire at age 55 can be supported by sound physiological data.
>
> Report on the Establishment of a Mandatory Retirement Age as a BFOQ for the New Jersey State Police, New Jersey Department of Law and Public Safety, December, 1984.

Albert M. Antlitz, M.D., Head of the Division of Cardiology and Department of Electrocardiology at Mercy Hospital, Baltimore, Maryland, observed that:

> Although there may be some individuals aged 55 and older who can safely and efficiently perform the duties of a...state police officer..., it is my opinion that substantially all persons aged 55 and older are not able to perform safely and efficiently the duties of that job because of underlying significant coronary artery disease which is not practically detectable by current medical techniques.
>
> Ibid.

Thus, in addition to recognizing that certain occupations should be subject to different standards, Congress and states that have established age as a bona fide occupational qualification (BFOQ) have considered and rejected arguments that individualized testing is a safe and reliable substitute for pre-established age limits.

The BFOQ Defense is Inadequate for State and Local Public Safety Officers and Results in Unnecessary Expense, Inconsistent Interpretations and Confusion

Those who question the need for the legislation we propose argue that state and local governments may establish maximum entry and retirement ages of less than 70 pursuant to the BFOQ exception of the ADEA. Although a minimum or maximum service age may be upheld if the entity seeking to uphold it can demonstrate that the age requirement is "reasonably necessary to the normal operation of the particular business," courts have inconsistently interpreted this standard, particularly in cases involving public safety officers.

As of March, 1986, at least 33 states or localities thereof have been or are now being sued by the EEOC for the establishment of mandatory retirement or minimum hiring age laws. States and localities are often burdened by multiple lawsuits brought by the EEOC and private plaintiffs. While some state and local courts have upheld their entrance and retirement ages for sheriffs, police officers, fire fighters and state troopers, court decisions involving the same occupations in other states and localities have overruled hiring and retirement age requirements. These conflicting judicial holdings have resulted in considerable confusion for state and local governments.

In addition, jurisdictions wishing to uphold their standards are forced to engage in costly medical studies to support their standards and then may have to contend with time-consuming and expensive litigation against the EEOC or private plaintiffs. Those states and localities lacking the financial resources to defend their age limitations must consider forsaking these limits, thereby suffering the very consequences that Congress avoided by establishing age requirements for federal public safety personnel. These ramifications include:

- increased risk to the public attributable to the increasing prevalence of cardiovascular as well as other debilitating diseases with age.

- disruption of normal career patterns and job assignments.

- exposure of the employer to increased liability, occupational injuries and disability pension costs.

- implementation of costly and substantial periodic medical testing procedures of uncertain reliability.

Mandatory Retirement for Law Enforcement and Fire Fighting Employees is Strongly Supported by Associations Representing These Occupations

The Wyoming decision has jeapordized the legality of state laws in at least 32 states as well as local laws which establish retirement ages of 69 or less for state and local public safety officers. For example, Alabama and California require state highway patrolmen to retire at 60, while Vermont and Delaware set 55 as the retirement age. States and localities must now raise their retirement ages to 70 or risk facing costly litigation.

Reaction to the Wyoming decision has been swift. Numerous state and local governmental organizations have urged Congress to resolve the inconsistency between federal law and state and local laws. The National Governors' Association, the National Association of Attorneys General and the National Association of Counties are among the numerous organizations which endorse H.R. 1435.

More significantly, S. 698 is strongly supported by those whose careers and livelihoods will be affected by this legislation--the individual state trooper, sheriff, police officer and fire fighter. S. 698 is supported by the 45,000 member National Sheriffs Association, the AFL-CIO affiliated International Association of Firefighters, the 30,000 member National Trooper Coalition and the 14,000 member International Association of Chiefs of Police. A complete list of the organizations who have endorsed their support for this legislation is attached.

CONCLUSION

Under S. 698, state and local governments would remain unable to make arbitrary employment decisions based on age under the ADEA. Employees would still be protected from age discrimination in promotions, compensation and other terms, conditions and privileges of employment. Only in the very narrow area of hiring and retiring law enforcement officers would S. 698 permit state and local governments to make decisions based on general public safety considerations.

It is important to recognize that S. 698 does not require a state or locality to establish a mandatory retirement age. Moreover, under S. 698, a state or locality could elect to eliminate mandatory retirement.

The issue of mandatory retirement for police officers and fire fighters is not limited to a debate on individual rights, but must include a proper consideration of the overriding interest in general public safety. As long as any doubt remains regarding the ability of medical tests to predict individuals capacity to perform, this matter must be resolved in favor of public safety. States and localities, public safety unions and employees are in the best position to determine what age, if any, law enforcement officers should retire.

We urge your favorable consideration of this important legislation. Thank you.

ORGANIZATIONS THAT HAVE ENDORSED THE AGE DISCRIMINATION IN EMPLOYMENT ACT PUBLIC SAFETY OFFICERS AMENDMENTS OF 1985

as of March 10, 1986

National Sheriffs Association
National Governors Association
International Association of Firefighters
International Union of Police Organizations
National Association of Attorneys General
National Troopers Coalition
National Institute of Municipal Law Officers
National Association of Police Organizations
International Brotherhood of Police Officers
International Association of Chiefs of Police
National League of Cities
National Association of Counties
Utah Department of Public Safety
City Council of Modesto, California
Vermont Department of Public Safety
California State Firemen's Association
Police Department of Grosse Point Shores, Michigan
Fire Department of Grosse Point Shores, Michigan
Police Department of Philadelphia, Pennsylvania
California Highway Patrol
Sheriff's Office of Los Angeles County, California
Town of San Anselmo, California
City of East Providence, Rhode Island
Fire Fighters Association of New Jersey
Combined Law Enforcement Associations of Texas
County Supervisors Association of California
Nebraska State Patrol
County Board of Supervivors, Los Angeles County, California
League of California Cities
New Jersey State Police
Sheriff's Department of San Diego County, California
County Board of Supervisors, Butte County, California
National Association of County Officials
National Troopers Association of Albany, New York
County Board of Supervisors, Napa County, California
Association of Washington Cities
California Department of Forestry Employees Association
California Association of Highway Patrolmen
League of Iowa Municipalities
California Union of State Employees
City of San Buena Ventura, California
City of Concord, California
Department of Public Safety, Jefferson City, Missouri

Michigan Deparmtent of State Police
City Council of Palm Springs, California
City of Fullerton, California
Federated Firefighters of California
Fraternal Order of Police, Balitimore, Maryland
Illinois State Police
City of Greenfield, Wisconsin
City of San Clemente, California
Kentucky State Police
League of Arizona Cities and Towns
City of Santa Maria, California
Minnesota Department of Public Safety
City Council of Fullerton, California
Police Department of Omaha, Nebraska
Peace Officers Research Association of California
State Firemen's Association
Tennessee Department of Safety
Wyoming Highway Patrol
New York State Police

AT LEAST 33 STATES OR LOCALITIES THEREOF HAVE BEEN OR ARE NOW BEING SUED BY THE EEOC AS OF MARCH, 1986 FOR THE ESTABLISHMENT OF MANDATORY RETIREMENT AGE LAWS OR MINIMUM HIRING AGE LAWS

California
Colorado
Delaware
Florida
Georgia
Illinois
Indiana
Kentucky
Louisiana
Maryland
Massachusetts
Michigan
Mississipi
Missouri
New Jersey
New Mexico
New York
Nevada
North Carolina
Ohio
Oklahoma
Oregon
Pennyslvania
Rhode Island
South Carolina
Tennessee
Texas
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

March 18, 1986
Testimony of Senator John Heinz
before the U. S. Senate
Subcommittee on Labor, Committee on Labor and Human Resources
Hearing on the Mandatory Retirement of
State Law Enforcement and Firefighting Personnel

John Heinz

I would like to thank Chairman Hatch and Subcommittee Chairman Nickles for allowing me to submit written testimony on the issue of mandatory retirement of State law enforcement and firefighting personnel. As Chairman of the Special Committee on Aging, I have a longstanding interest in employment practices and policies that affect older workers. At issue are several pending legislative proposals which seek to exempt, from certain aspects of the Age Discrimination in Employment Act (ADEA), firefighters and law enforcement officers employed by state and local political subdivisions. States and localities would be able to set age limits at which they could refuse to hire, or could mandatorily retire, law enforcement personnel.

I recognize that this is an issue on which reasonble men and women can, and do, differ. It is my belief, however, that mandatory retirement and hiring age limits for public safety workers are repugnant to the letter and spirit of the ADEA, which was enacted to "promote employment of older persons based on their ability rather than age" and to "prohibit arbitrary age discrimination in employment." Simply stated, it was Congress' intention that age should not be used as the principal determinant of an individual's ability to perform a job, but that this determination, to the greatest extent feasible, should be made on an individual basis. Maximum hiring age limitations and mandatory retirement ages conflict with this intent because they are based on notions of age-based incapacity and do not consider an individual's potential or job performance.

An argument often raised by proponents of an exemption is that age limitations are necessary to allow states and localities to maintain a vigorous public safety workforce. At the outset let me state that state and local police and fire departments have a legitimate and strong interest in maintaining fit police and fire forces. No one wants to jeopardize the lives of officers or their co-workers, or to endanger citizens of the community, whose safety the officers are sworn to protect. No one disputes that officers must be in good physical condition in order to perform their jobs.

It should be made crystal clear, however, that the ADEA does not require public safety agencies to keep unfit employees. Moreover, age limits are allowed by the ADEA if age can be shown to be a "bona fide occupational qualification" (BFOQ). The BFOQ exception is triggered where an employer can show that the job qualification is reasonably necessary to the essence of its business and that there is a factual basis to believe that all workers above a certain age are not qualified or that individual testing is highly impractical. In short, all that the ADEA requires is that the employer make individualized assessments where it is possible and practical to do so. I believe that such determinations are possible and that it is reasonble to require them rather than imposing age limits based solely on age. Let's look at the facts.

As reported by the House Select Committee on Aging, research on the performance of older law enforcement officers and firefighters supports the conlcusion that job performance does not invariably decline with age:

***Paul Davis, an exercise physiologist, has stated that age does not determine who can safely and adequately perform law enforcement or firefighter positions. His research has demonstrated that there are physically fit persons in all age groups.

***Research by Isidore Silver and Edith Flynn reveals that the absence of hiring age limits for law enforcement officers has no bearing on the future success of applicants. They found that older officers had a lower rate of civilian complaints, absenteeism and turnover.

***The judgment of older firefighters can be used for the benefit of the young and less experienced personnel by warning them of the risks and hazards involved in the particular fire fighting situation.

***The age of a firefighter contributes to the firefighter's knowledge and skill on the job; these benefits are reflected in statistics that reveal an inverse relationship between injury and age.

Research also shows that it is possible to test for the ability of an individual to perform the duties of law enforcement officer of firefighter. A study of the City of Los Angeles fire department has shown:

***That one can test for an individual firefighter's fitness to perform his job;

***That through medical examinations, physical fitness testing and physical fitness training, the department has increased its fitness levels and reduced risk factors associated with atherosclerotic heart disease;

***That its fitness program has played a major role in reducing injuries occuring on duty;

***That front line firefighters in their 50's and 60's have passed their medical examinations; and,

***That its fitness program has proven to be cost efficient.

Other research has also shown that there are accurate and economical ways to test physical fitness and predict levels of performance for public safety occupations. Experts say, for example, that the identification and analysis of risk factors and the results of limited exercise stress tests can give a useful estimate of whether or not an individual has coronary disease, a potential problem for older law enforcement officers. Experts also confirm that the psychological stress and strain sometimes suffered by those performing police and fire work can be detected by clinicians with a few questions. In the City of Los Angeles, the cost of periodic fitness testing is between $150 and $250 per year per employee and its fitness program has cut back on work-related disabilities estimated to cost the city an average of $250,000.

Currently, in many jurisdictions, an officer's physical condition is not closely monitored after his or her appointment to the force. One can only wonder how many young officers would be found physically incapable to perform strenuous police and fire responsibilities if closely scrutinized. Indeed, many of the older officers tested by Dr. Paul Davis had better health and fitness profiles than the younger officers that he tested. If our interest truly lies in keeping a vigorous work force to protect the public, a requirement that all officers, whatever their age and rank, undergo regular physical examinations, will only serve to enhance the overall fitness of the force.

Arbitrary age delineations are unreliable and discriminatory. The only fair way to determine who is physically qualified to perform police and fire work is to test ability and fitness. There is no doubt that many older police officers and firefighters can handle the rigors of their work and those who cannot can be identified with reasonable certainty.

I note with dismay recent testimony in disparagement of the Equal Employment Opportunity Commission (EEOC) for challenging the arbitrary minimum hiring age limits and mandatory retirement practices of State and local police and fire departments. To their credit, the EEOC has sought only to enforce the law as decreed by Congress and as interpreted by the Supreme Court. The solvency of pension funds for police officers and firefighters has also been cited with concern by those in favor of an exemption. I would merely remind this panel that an employer's desire to have the most cost-effective workforce cannot justify discrimination where age is not a BFOQ.

We have fought long and hard to combat discriminatory employment practices in the areas of race, sex, religion, national origin and age. Congress has unequivocally voiced its opposition to stereotypical assumptions about age and ability that have no factual basis. Measures to exempt police and firefighters from the coverage of law represent a breaking down of the walls of protection that we have erected for the individual. Any such exemption would be a serious erosion of the ADEA and dimunition of the employment rights of older workers. Efforts to pass such legislation snould be steadfastly resisted. To do otherwise is to substantially retreat from the concept Congress recognized almost two decades ago when we passed the ADEA -- that performance be judged on ability and not by date of birth.

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STATEMENT OF
THE NATIONAL LEAGUE OF CITIES

on

RETIREMENT POLICY FOR PUBLIC SAFETY EMPLOYEES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

before the

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE

March 18, 1986

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The National League of Cities (NLC), the nation's largest and most representative municipal organization, represents 16,000 cities through direct membership and membership in 49 affiliated state municipal leagues. On March 9, NLC's Board of Directors adopted policy calling for the enactment of legislation to exempt state and local public safety employees from the Age Discrimination in Employment Act of 1967 (ADEA).

The ADEA prohibits age-based discrimination against workers between the ages of 40 and 70 and was extended to state and local employees by Congress in 1974. NLC strongly supports the basic objective of the ADEA: The prohibition of age-based discrimination in employment practices. However, we believe that the ADEA should be amended to recognize the unique conditions of employment as a police officer or firefighter. The ADEA includes a provision exempting employees from its protections if the employer establishes that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. Section 623(f)(1). This so-called BFOQ provision (which, on its face, would appear to cover public safety employees) has been applied inconsistently by the courts and regulatory agencies and, as a consequence, cities cannot readily use the provision for public safety purposes.

Mandatory early retirement for public safety employees is generally supported by both employees and employers. Because of the physically demanding and stressful nature of law enforcement and firefighting work, it is necessary for both health and public safety reasons. Additionally, a clear national policy defining the circumstances in which early retirement can be required for public safety employees should be established to enhance the ability of cities to develop long range plans for financing payroll and retirement costs.

There are many reasons why state and local employees engaged in public safety activities should be exempt from the ADEA, including the physically stressful character of the work and the difficulties involved in developing reliable, safe, and cost-efficient tests of an individual's physical fitness. In the absence of clear standards governing the circumstances in which a mandatory retirement age of less than 70 years of age can be used for police officers and firefighters, the ADEA will hamper the provision of basic public safety and fire protection services.

EXISTING RETIREMENT PRACTICES FOR PUBLIC SAFETY EMPLOYEES

States and localities have generally established compensation plans which provide high salaries and generous retirement benefits at an early age and are intended to reflect the risks and skills involved in fighting fires and crime. These plans are primarily financed by tax revenues and, as a consequence, states and localities must develop long-term plans to meet these financial obligations, including plans for financing the costs of pension benefits for retirees and salaries for public safety employees. Neither immediate nor long-term financial obligations can be readily determined if a uniform and predictable retirement age for firefighters and police officers cannot be established.

Retirement Plans and Benefits

In 1982, an estimated $1.555 billion was distributed to retired police officers and firefighters by pension systems of limited applicability (*i.e.*, systems established solely for police officers and/or firefighters) as retirement benefits. *Employee-Retirement Systems of State and Local Governments*, 1982 Census of Governments, U.S. Dep't of Commerce, Bureau of the Census, Table 6. The total sum paid to retired police officers and firefighters in pension benefits is many times that amount when benefits received by police officers and firefighters each year from retirement systems of general applicability are taken into account. According to the Census Bureau, full time police officers and firefighters employed by states and localities nationwide numbered 853,000 and earned $21.048 billion in 1984. Public Employment in 1984, U.S. Dep't of Commerce, Bureau of the Census, Tables 3 and 4. Thus, the amount of state and local government revenues allocated to salaries and retirement benefits for state and local public safety personnel is substantial.

In numerous cases, firefighters and police officers are members of small separate retirement systems and retire at a relatively early age under these systems. Pension Task Force Report on Public Employee Retirement Systems, House Committee on Education and Labor, 95th Cong., 2d Sess. (March 15, 1978) at 103. For example, the number of retirement systems which specifically apply to public safety personnel is 1685, according to the Bureau of the Census. Employee-Retirement Systems of State and Local Government, 1982 Census of Governments, U.S. Department of Commerce, Bureau of the Census, Table 7. This number does not even include the larger retirement systems of general applicability which cover other public employees as well as public safety personnel.

The 1685 retirement systems which cover only public safety personnel have 338,254 public safety employees as members and assets of $18.104 billion. There are 675 systems covering firefighters, 802 covering police officers, and 208 which cover both firefighters and police officers. The fact that these systems are small (and therefore not broad-based) makes the establishment of clear standards for compulsory retirement all the more important.

The systems are usually small, having on the average only 201 members, and, as a result, increases in the payments to individual beneficiaries will have a major effect on the overall condition of the system and the ability to meet obligations to retirees. For example, if a 62-year old firefighter suffers a heart attack and is entitled to disability pay for the rest of his or her life, the cost to the city will be in excess of the normal cost of retirement.

State Laws

Some 33 states require early retirement for police officers and/or firefighters by state law. In many cases, these compulsory retirement requirements are part of laws establishing pension rights for police officers or firefighters and underscore a direct linkage between retirement age and retirement benefits. For example, in California, firefighters may be involuntarily retired at age 60 after 20 years of service and are entitled to 50 percent of the salary received in the year prior to retirement. CAL. GOVERNMENT CODE Section 50870. In New Jersey, police officers and firefighters are required by state law to retire at age 65. N.J. REV. STAT. Section 17:4-6.14.

Massachusetts' state law requires that police officers retire at 65 and provides pension benefits of 60 percent of the highest annual rate of compensation plus one percent of that compensation for every year worked in excess of 20 (but not to exceed 72 percent of the final year's pay). MASS. GEN. LAWS ANN. ch. 32, Section 83A(d). In Wyoming, the mandatory retirement age for police officers is 60 percent and retirement benefits are calculated by multiplying 2.5 percent of the average salary during the five highest paid years times the number of years of service (but not to exceed 62.5 percent of the average salary during the five highest paid years). WYO. STAT. Section 15-5-307. Other states with similar laws which apply to city public safety personnel include Wisconsin and Minnesota.

In these states, cities are caught between a rock and a hard place, with the state setting one set of rules and the Federal Government setting another set of rules. In many cases, it is impossible to comply with both sets of requirements.

Retirement Ages

A recent survey of 100 large cities shows that 83 percent used a mandatory retirement age of 50 to 55. Flynn and Silver, "Police Selection" at 47. Assuming that this pattern also applies to fire departments, then, by applying the relevant percentage (i.e., 83 percent) to the total number of police and fire retirement systems (i.e., 1685), it can be estimated that 1399 of those systems are not in compliance with the ADEA. Section 12(a) (29 U.S.C. Section 631(a)) defines the persons covered by the ADEA as "individuals who are at least 40 years of age but less than 70 years of age" and clearly covers any person who is required to retire at age 50 or 55.

Generally, public safety personnel are allowed to retire at age 50 or 55 after 20 years of service and, in some cases, after 20 years of service regardless of age. Pension Task Force Report on Public Employee Retirement Systems (Pension Task Force Report), House

Committee on Education and Labor, 95th Cong., 2d Sess. (March 15, 1978) at 105. Virtually all other state and local employees are not eligible for a pension until a much later age (e.g., at age 65 for members of large municipal retirement systems). Id.

In order to operate a city police or fire department, a city must have the financial resources to compensate its police officers and firefighters properly, both while they are active members of the police or fire force and when they are retired. These are concurrent and related obligations. In other words, salaries and retirement benefits, including the number of employees and retirees eligible for each type of payment at any given time, must be determinable in order to run a city.

A mandatory retirement age for public safety employees clearly establishes the maximum number of years during which a police officers or a firefighter will be a salaried employee; it also establishes, with some degree of certainty, the date on which the city must begin making retirement payments. A mandatory retirement age also enables the city to determine the number of new police officers and firefighters which it must hire in a given year in order to replace retiring public safety personnel and maintain the active force at the necessary level.

For example, if the mandatory retirement age for firefighters in a particular year is 55 and the city has 100 active firefighters who are 54 years of age this year, earn an average annual salary of $30,000, and have an average life expectancy of 70, two very important actors are readily determinable. First, the city will need to hire 100 new firefighters in 1987 to maintain current staffing levels and, assuming a retirement system that provides retirees with 60 percent of the final year's salary, the city will be obligated to pay those retirees the equivalent of $27 million in 1986 dollars (.60 x $30,000 = $18,000; $18,000 x 15 years = $270,000 per retired firefighter; $270,000 x 100 retired firefighters = $27,000,000) in retirement benefits. That fact is essential in determining how much money should be set aside to finance its retirement system.

If, on the other hand, the city is precluded from setting and enforcing a mandatory retirement age, as is effectively the case under the recent Supreme Court interpretations of the BFOQ provisions of the ADEA, it must assume that the retirement age is 70 and plan accordingly. The result will be widespread uncertainty, particularly where voluntary retirement is permitted and encouraged (retirement at an early age is authorized by state or local law or a collective bargaining agreement in virtually all cases). There will be uncertainty as to the number of firefighters which a city can hire in a particular year because the number of vacancies caused by retirement will not be determinable.

Method for Calculation of Retirement Benefits

The pension benefits paid to police officers and firefighters tend to be high because of the method used in calculating pension benefits. For example, nearly 33 percent of the police and fire pension plans tie retirement benefits directly to the employee's rate of pay for his or her final day of work or for the final year of employment; an additional 36 percent use the average pay for the final two to five years of work as the basis for calculating retirement benefits. Pension Task Force Report at 114. Moreover, the formula for calculating retirement benefits is normally based on a relatively large multiplier. For 35 percent of the systems, benefits are determined by multiplying the compensation base times 50 to 60 percent. Id.

In 53 percent of the systems, retirement benefits are calculated by multiplying the number of years of service times a specified percentage. Id. A single rate (i.e., the same rate is used for each year of service) is used for 17 percent of the systems and a variable rate (i.e., the rate applicable to the earlier years of service may be higher or lower than the rate applicable to later years) for 36 percent of the systems. Id. The benefit formulas used for police and fire retirement plans tend to be more favorable for retirees than those used for federal civil service retirees. For example, 70 percent of the police and fire retirement systems which use the single rate benefit systems use a multiplier of 2.5 percent or more while only 25 percent of similar federal retirement systems use a multiplier of that magnitude. Id. Thus, pension costs may be increased by allowing the deferral of retirement to a later date, thereby establishing a higher base salary than originally anticipated when the city planned on the employee retiring at an earlier retirement date and a lower salary.

ROLE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) has authority under the ADEA to promulgate rules and regulations implementing the provisions of the ADEA, including the authority to "establish such reasonable exemptions to and from any or all provisions of [the ADEA]." 29 U.S.C. Section 628. See also Section 2 of Reorg. Plan No. 1 of Feb. 23, 1978, 43 Fed. Reg. 19807, as provided by section 1-101 of Ex. Or. No. 12106 of Dec. 28, 1978, 44 Fed. Reg. 1053.

The regulations issued by EEOC in 1981 provide no guidance to states and localities as to the circumstances in which a mandatory retirement age of less than 70 years of age can be established and enforced as a BFOQ under section 4(f)(1) of the ADEA. Furthermore, EEOC's regulations are designed to require case-by-case adjudication of the validity of any mandatory retirement age which is less than 70, including retirement ages for police officers and firefighters:

> Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. 29 C.F.R. Section 1625.6(a) (emphasis added).

That EEOC has interpreted section 4(f) of the ADEA as providing for case-by-case litigation on a standardless basis of every case involving an effort by state or local government to establish a mandatory early retirement age for public safety employees as a BFOQ is underscored by the following provision of the regulations:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must provide that the challenged practice does indeed effectuate that goal and that there is

> no acceptable alternative which would better advance it or equally advance it with less discriminatory impact. 29 C.F.R. Section 1625.6(b) (emphasis added).

The regulations provide no further guidance as to the circumstances in which a BFOQ can be established under the ADEA despite the fact that Congress authorized the use of BFOQ's "reasonably necessary to the normal operation of a particular business." EEOC's failure to promulgate regulations defining permissible BFOQ's has adversely affected the "normal operation" of city police and fire departments by creating uncertainty and confusion as to the circumstances in which mandatory early retirement ages can be utilized and underscores the need for a change in the underlying statute.

ROLE OF THE COURTS

The courts have not done any better than the EEOC, failing to develop readily applicable and understandable standards under section 4(f)(1) of the ADEA which define the circumstances in which age may be used as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. Section 623(f)(1). As a result, the "standards" for the utilization of age as a BFOQ are being established on a case-by-case basis. See EEOC v. St Paul, 500 F. Supp. 1135 (D.C. Minn. 1980) (mandatory retirement age of 65 for uniformed employees of fire department is not a BFOQ); *Adams* v. *James*, 526 F. Supp. 80 (M.D. Ala. 1981) (mandatory retirement age of 60 for state troopers is not a BFOQ); *Orzel* v. *Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983) (mandatory retirement age of 55 for firefighters is not a BFOQ); *Campbell* v. *Connalie* , 542 F. Supp. 275 (N.D. N.Y. 1982) (mandatory retirement age of 55 for state police is not a BFOQ); *EEOC* v. *Minneapolis*, 537 F.Supp. 750 (D.C. Minn. 1982) (mandatory retirement age of 65 for police captains is not a BFOQ). *But see EEOC* v. *Commonwealth of Pennsylvania*, 596 F.2d 1333 (M.D. Pa. 1984) (mandatory retirement age of 60 for state policemen is a BFOQ); *Morgan* v. *Dep't of Offender Rehabilitation*, 305 S.E.2d 130 (1983) (mandatory retirement age of 65 for state correctional officers is a BFOQ); *Mahony* v. *Trabucco*, 738 F.2d 35 (1st Cir. 1984) (mandatory retirement age of 50 for state police is a BFOQ); *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984) (mandatory retirement age of 60 for state troopers is a BFOQ).

If Congress does not exempt public safety employees from the ADEA, lawsuits may well be necessary in each case in which a state or local government establishes a mandatory early retirement age for public safety personnel. Two recent Supreme Court decisions interpreting the BFOQ provision of the ADEA have added to the confusion and further restricted the circumstances in which mandatory early retirement ages can be established for police officers and firefighters. In fact, prior to these Supreme Court decisions, many city officials believed that mandatory early retirement rules for public safety employees could be established under the ADEA's BFOQ provision.

In Western Air Lines, Inc. v. Criswell, 105 S.Ct. 2743 (1985), the Supreme Court established rules for the courts to use in applying the BFOQ exception in cases in which the employer claims that an early retirement age is justified by factors such as safety. At issue in the case was whether an airline could establish a mandatory retirement age for flight engineers of 60 without making an individualized determination of the employee's fitness to work as a flight engineer beyond that age.

In Johnson v. Mayor and City Council of Baltimore, 105 S.Ct. 2717 (1985), a related case decided on the same day which involved a mandatory retirement age of 55 for firefighters, the Supreme Court ruled that a federal statute mandating the retirement of federal firefighters at the age of 55 was not relevant in determining whether a mandatory retirement age of 55 for city firefighters was valid under the BFOQ exception to the ADEA.

Instead, the Supreme Court ruled 9 to 0 in an opinion by Justice Thurgood Marshall, that it would be "remiss, in light of Congress' indisputable intent to permit deviations from the mandate of the ADEA only in light of a particularized, factual showing ... to permit nonfederal employers to circumvent this plan by mere citation to an unrelated statutory provision that is not even mentioned in the ADEA."

Instead, the Supreme Court ruled in the Baltimore case that the relevant standards for determining whether the BFOQ exception is a valid defense are set forth in the Western Airlines case and cannot be derived by analogy from a federal statute establishing a mandatory retirement age for similarly situated federal employees.

In the Western Airlines case, the defendant airline sought a ruling that age could be used as a BFOQ if the employer could establish "'a rational basis in fact' for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis." If this standard had been adopted by the Court, an employer would not have been required to make an individualized showing of the employee's lack of fitness to continue working.

In an 8 to 0 ruling, the Supreme Court, in an opinion written by Justice Paul Stevens, ratified a strict standard developed by the lower courts for determining the validity of an early retirement age under the BFOQ exception, relying primarily on a 1976 ruling by the Court of Appeals for the Fifth Circuit in the Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), case. Under the standard established by the Supreme Court in the Western Airlines case, an employer must base an early retirement age on one of two specified safety-related grounds.

First, the employer may establish a mandatory early retirement age if there was a "factual basis for believing, that all or substantially all [persons over a maximum age] would be unable to perform safely and efficiently the duties of the job involved." Second, an employer may use age as a BFOQ if it can be established that "age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis."

In either case, the question is one which must be resolved by a jury. According to the Supreme Court, "Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by-case basis' by proof to a jury."

In other words, the employer must convince a jury that medical testing is impractical or that there is a "substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position." The Supreme Court's rulings in the Baltimore and Western Airlines cases mean that mandatory early retirement ages will be overturned unless one of the two tests established in the Western Airlines case is met to the satisfaction of a jury.

In each of these cases -- as well as countless other cases -- litigation will be necessary to determine whether or not the mandatory retirement age qualifies as a BFOQ under the ADEA. In fact, there are already numerous lawsuits pending which were brought against state and local governments by EEOC and other parties concerning the validity under the ADEA of mandatory early retirement ages for public safety personnel. See Exhibit A

CONCLUSION

NLC strongly urges the enactment of legislation exempting state and local public safety employees from the ADEA. Congress has determined that federal firefighters and police officers may be required to retire at age 55. 5 U.S.C. Section 8335(b). Similarly, it requires air traffic controllers to retire by the age of 56. 5 U.S.C. Section 8335(a). The case for state and local authority to establish similar requirements for police officers and firefighters is no less compelling.

Legislation to exempt public safety employees from the ADEA is supported by both employer and employee groups. It is essential that Congress act immediately to eliminate the problems the ADEA is causing for the operation of police and fire departments and for police officers and firefighters. We urge immediate action on legislation which is narrowly crafted and limited to the public safety issue and are opposed to any effort to broaden the legislation to include other provisions.

EXHIBIT A

PARTIAL LIST OF ADEA LAWSUITS FILED BY EEOC

EEOC v. *City of Allen Park*, No. 79-72986 (W.D. Mich., filed July 25, 1979) (mandatory retirement age of 57 for municipal police officers and firefighters)

EEOC v. *Janesville and State of Wisconsin*, No. 79-481 (W.D. Wisc., filed Oct. 19, 1979) (mandatory retirement age of 65 for "protective occupations")

EEOC v. *Marathon County Sheriff's Dep't and State of Wisconsin*, No. 79-599 (W.D. Wis., filed Dec. 11, 1979) (state law mandating retirement at age 55 for state and local police officers)

EEOC v. *City of St Paul and State of Minnesota*, No. 3-79-630 (D. Minn., filed Dec. 18, 1979) (state law mandating retirement for all firefighters at age 65)

EEOC v. *State of Louisiana and Louisiana State University*, No. 80-0280 (E.D. La., filed March 28, 1980) (state law mandating retirement at age 65 of state employees engaged in public safety occupations)

EEOC v. *City of Clintonville*, No 80-C-708 (E.D. Wisc., filed Aug. 1, 1980) (mandatory retirement age of 57 for the city's police chief)

EEOC v. *City of Ecorse*, No. 80-7-3383 (E.D. Mich., filed Sept. 4, 1980) (mandatory retirement age of 60 for municipal fire chief)

EEOC v. *City of Fort Smith*, No. FS-C-80-2158 (W.D. Ark., filed Sept. 17, 1980) (mandatory retirement age of 62 for city's assistant fire chief and fire captain)

EEOC v. *County of Dane*, No. 80-C-578 (W.D. Wisc., filed Nov. 3, 1980) (mandatory retirement age of 60 for county law enforcement personnel)

EEOC v. *City of Altoona*, No. 80-418 (W.D. Pa., filed March 18, 1981) (state law mandating retirement of oldest firefighters first in any economically necessary personnel cutback)

EEOC v. *City of Mantramck*, No. 81-71353 (E.D. Mich., filed April 29, 1981) (mandatory retirement after 30 years of service for chief of city's fire department)

EEOC v. *City of Lansing*, No. G81-281 (W.D. Mich., filed May 28, 1981) (mandatory retirement age of 60 for municipal firefighters)

EEOC v. State of Wyoming, No. C81-0180 (D. Wyo., filed July 9, 1981) (state law mandating retirement at age 65 for any state or local employee who is a member of the state retirement system)

EEOC v. City of Riverview, No. 81-72427 (E.D. Mich., filed July 16, 1981) (mandatory retirement age of 50 for police officers after 25 years of service)

EEOC v. Town of Chesterton, No. H-81-398 (N.D. Ind., filed July 7, 1981) (mandatory retirement age of 60 for law enforcement personnel)

EEOC v. City of Highland Park, No. 81-27260 (E.D. Mich., filed August 8, 1981) (mandatory retirement age for city police chief)

EEOC v. City of Houston, No. H-81-2485 (S.D. Tex., filed Sept. 25, 1981) (mandatory retirement age of 65 for all fire department personnel)

EEOC v. State of Michigan, No. G81-756-CA5 (W.D. Mich., filed Sept. 3, 1981) (state law mandating retirement of state police officers at age 56)

EEOC v. City of Minneapolis and Minnesota Police Relief Association, No. 4-81-660 (D. Minn., filed Oct. 9, 1981) (mandatory retirement age of 65 for police captain)

EEOC v. Missouri State Highway Patrol, No. 82-4129-CV-C-5 (W.D. Mo., filed July 7, 1982) (mandatory retirement age of 60 for state troopers)

EEOC v. City of Newcastle and Commonwealth of Pennsylvania, No. 82-1881 (W.D. Pa., filed Sept. 9, 1982) (state law requiring that the oldest firefighters be retired first if there is a reduction in force)

EEOC v. City of Portland, No. 83-50 (D. Ore., filed Jan. 13, 1983) (mandatory retirement age of 65 for police captains)

EEOC v. Pennsylvania State Police, No. 83-0321 (M.D. Pa., filed May 9, 1983) (state law mandating retirement at age 60 for state police officers)

EEOC v. City of Knoxville, No. 3-83-364 (E.D. Tenn., filed June 13, 1983) (mandatory retirement age of 60 for police officers and firefighters after 25 years of service)

EEOC v. *Indiana Dep't of Natural Resources*, No. IP83-858-C (S.D. Ind., filed June 27, 1983) (state law mandating retirement of state conservation law enforcement personnel at age 60)

EEOC v. *California Office of State Marshall*, No. 5-83-856-LKK (E.D. Cal., filed July 28, 1984) (mandatory retirement age of 65 for state fire marshals)

EEOC v. *City of New Castle*, No. 83-1899 (W.D. Pa., filed Aug. 11, 1983) (mandatory retirement age of 65 for police officers)

EEOC v. *California Public Employees Retirement System*, No. 83-943-MLS (E.D. Cal., filed Aug. 22, 1983) (state law mandating retirement of municipal public safety personnel at age 60)

EEOC v. *Indiana State Police*, No. IP-83-1207-C (S.D. Ind., filed Aug. 29, 1983) (state law mandating retirement of state police officers at age 55)

EEOC v. *Mississippi State Tax Commission*, No. J83-0717(B) (D.D. Miss., filed Sept. 9, 1983) (mandatory retirement age of 65 for revenue inspectors and enforcement officers)

Crevier v. *City of East Providence*, No. 83-0470-S (D. R.I., intervenor motion filed on Sept. 28, 1983) (mandatory retirement age of 65 for police department personnel)

EEOC v. *City of Pittsburgh*, No. 83-2712 (W.D. Pa., filed Oct. 27, 1983) (mandatory retirement age of 65 for police officers)

EEOC v. *Port of Portland*, No. 83-1821 (D. Ore., filed Nov. 29, 1983) (mandatory retirement age of 60 for firefighters)

EEOC v. *State of New York*, No. 84-CV-12 (N.D. N.Y., filed Dec. 12, 1983) (mandatory retirement age of 55 or 60 depending on rank for state police)

EEOC v. *State of Florida*, No. 84-7039-WS (N.D. Fla., filed Feb. 6, 1984) (mandatory retirement age of 62 for state highway patrol officers)

EEOC v. *Borough of Coraopolis*, No. 84-736 (W.D. Pa., filed March 26, 1984) (state law mandating the retirement of the oldest firefighters during a reduction in force)

EEOC v. *Sayad*, No. 84-0894-C(3) (E.D. Mo., filed April 18, 1984) (mandatory retirement age of 65 for St. Louis police officers)

EEOC v. County of Los Angeles, No. 84-3181-KN (MCX) (mandatory retirement age of 60 for public safety personnel)

EEOC v. New Mexico State Police, No. 84-797-BB (D. N. Mex., filed May 21, 1984) (state law mandating the retirement of state police personnel at age 62)

EEOC v. New York City Housing Authority, No. 84-CIV-4547 (S.D. N.Y., filed June 27, 1984) (mandatory retirement age of 63 after 20 years of service for housing authority police)

EEOC v. Commonwealth of Massachusetts, No. 84-2595-MA (D. Mass., filed Aug. 22, 1984) (mandatory retirement age of 65 for municipal firefighters)

EEOC v. Commonwealth of Kentucky, No. CA-84-62 (E.D. Ky., filed Aug. 29, 1984) (state law mandating the retirement of state police officers at age 55)

EEOC v. City of St. Louis, No. 84-2063-C(5) (E.D. Mo., filed Aug. 29, 1984) (mandatory retirement age of 60 for firefighters)

EEOC v. City of Yonkers, No. 84-CIV-6831 (S.D. N.Y., filed Sept. 21, 1984) (mandatory retirement age of 64 for police officers and firefighters)

1816

STATE OF INDIANA

Governor Robert D. Orr

Governor's Oversight Committee For Mandatory
Retirement Age Of Public Safety Officers

Chairman
Bob Small

Sen. Joseph Harrison

Sen. Allie Craycraft

Rep. Laverne Tucher

Rep. George Schmid

Ron Buckler

Kevin Dongan

Paul Greenwalt

Tom Miller

Phil Sanders

John Shettle

Fred Swift

February 28, 1986

Chairman Don Nickles
Subcommittee on Labor
Washington, D.C. 20510

Dear Sir:

The Governor's Oversight Committee for the Determination of Mandatory Retirement Age of Public Safety Officers respectfully requests to go on record in support of S. 62, S. 698 and S. 1240.

The passage of these bills would relieve the financial burden to the various pension funds placed upon them in defending EEO complaints as well as help raise the morale of public safety officers. These particular bills are favored by both management and labor in that they allow for upward mobility and continued confidence in the ability of the individuals in command, ensure public safety and allow stability among the various public safety pension funds.

I urge passage of S. 62, S. 698 and S. 1240 by the committee and action on the same by the full Senate. I further urge that immediate consideration be given to H.R. 1435, which deals with the same subject matter, if it receives favorable action in the House and passes to the Senate.

Sincerely,

Bob Small

Bob Small
Chairman

BJS:eh

Indiana State Police Alliance, Inc.

ISP ALLIANCE

Riley Towers • 225 E. North • Suite D
Indianapolis, Indiana 46204
(317) 636-0929 1-800-382-1104

March 5, 1985

Chairman Don Nickles
Subcommittee on Labor
Washington, DC 20510

Dear Chairman Nickles:

We most respectfully request this communication be entered into the Congressional Record in support of S.1240, introduced by Senator Dan Quayle of Indiana.

The Indiana State Police Alliance, Inc., an association of active and retired Indiana State Police Officers has previously spoken in support of mandatory retirement for police and fire service employees regularly employed by state, county and municipal governments.

Previously, the Alliance conducted a survey of our membership, the results of which overwhelmingly support madatory retirement at age 55 for Indiana State Troopers. More importantly, we strongly believe the individual states should have the authority to administer their own hiring and firing practices, as does the Federal Government for federal law enforcement personnel.

A career in law enforcement requires an officer be in a physical condition that is conducive to satisfactory performance of those job responsibilities. High speed driving, requiring quick reflexes; both day and night work exposures, requiring good vision and depth perception; the possibility of extreme physical exertion; high stress and all the accompanying pressures of the job demands a specimen most fit.

We believe that the citizens of Indiana deserve to be served by Troopers who are properly selected, adequately trained, and held to a high standard of performance, provided with the best available equipment, and only those physically fit to perform those job functions should be permitted to serve.

The Indiana State Police Alliance urges the passage of S.1240. Thank you for the opportunity to submit this written testimony to your committee.

Sincerely,

INDIANA STATE POLICE ALLIANCE, INC.

James A. Rhinebarger

James A. Rhinebarger, President
Senior Trooper/Investigator, Indiana State Police Department

JAR/sf

cc: Indiana Delegation

MEMBER NATIONAL TROOPERS COALITION

STATEMENT OF DAVID HILYCORD, LEGISLATIVE LIAISON, INDIANA FRATERNAL ORDER OF POLICE

Statement

of

DAVID HILYCORD
LEGISLATIVE LIAISON

INDIANA FRATERNAL ORDER OF POLICE

The Indiana State Fraternal Order of Police (IFOP), would like to thank Chairman Nickles and the members of the Subcommittee on Labor for giving us the opportunity to submit our views on the Proposed Amendments to the Age Discrimination in Employment Act ADEA. Because our main concern is with S.1240, The Public Safety Officers Amendment, we have restricted our comments to that measure.

The FOP is a voluntary Professional Organization organized in 1934. It is comprised of Police Officers and other Law Enforcement Personel. From all sections of the United States. We in Indiana represent over 10,000 Law Enforcement Officers. Throughout the existance , the FOP has striven to acheive proper, conscientious and resolute Law Enforcement. In All of its activities the FOP has been constantly devoted to the steady advancement of the Nations Best welfare and well-being. We address this subcommittee today on behalf of the vast majority of our menbers, who believe that the Public's Safety and Well Being can be better protected if State and Local Governments have the Authority to control Age Requirements for their own Law Enforcement Personel.

Let me first commend Senator Quail, for his efforts in introducing S.1240. We believe that when Congress amended the ADEA in 1978, extending its application to the States, it did not intend for Law Enforcement Agencies to be affected. Unfortunately these Agencies have been affected. Congress recognized the unique needs of the Law Enforcement Proffession when it exempted Federal Law Enforcement Officers from the ADEA. The same considerations which prompted that decision apply to State and Local Agencies as well. We urge Congress to remedy this Inconsistancy by Expressly Exempting State and Local Police Agencies from the Act.

It is difficult to seperate what is a valid Age Qualification in Policing from what may be simply Arbitrary AGE Discrimination. The response to a challenge of Age Discrimination has been the defense that Police work is often active, Physical and stressfull, and it is a logical and necessary part of a successful Publice Safety Personel Program, that Officers not be past the age of effective physical reaction and performance.

The Law Enforcement Profession places great physical strains on its Officers. There is probably no other civilian profession, except Firefighting, that requires as much physical effort. Officers must therefore be physically at their prime. An Officer may place both his life and the lives of others in considerable danger if he/she is unable to react quickly, physically and appropriately. No amount of fitness training can completely compensate for the natural decline in Physical ability that comes with age.

"Public Safety" is the key words to our presentation today. Our charge as Law Enforcement Officers is to protect persons and property and we take that charge very seriously. The facts of life today indicate that we are living in social and Economic times which dictates human behavior which many times is Bizarre.

In our profession it is clear that Policemen have long periods of low levels of physical activity, punctuated with periods of active duty which often calls for high levels of energy expenditure when suspects have to be chased, when physical combat is required, when victims of accidents have to be physically removed from the scene,ETC. In all or many of these physically demanding circumstances, and in some of the physically undemanding circumstances, there is a constant and often high level of physiological or emotional stress on a Policeman. I mention these things for your information based upon my personal experience. Since I have served Columbus Indiana (and am now serving) for 28 years and can readily attest to the demands of the Profession.

In oreder to encourage Federal Law Enforcement Officers (and Firefighters) to retire at Age 50, Congress revised their Retirement Pension System in 1974, the Legislative History clearly states the reasoning behind this statute.

STATEMENT

The history of Retirement Legislation dealing with Law Enforcement Officers and Firefighters shows Congressional intent to liberalize Retirement Provisions so as to make it feasable for these employee's to retire at AGE 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for strength and stamina of the young, rather than the middle aged. Older employees in these occupations should be encouraged to retire.

S. Rep. No. 93-948, 93rd Congress 2nd Session (1974) Reprinted in 1974 in U.S. Code Cong. and Hd. news, 3699,3701.

Under this Statute, Congress achieved the goal of maintaining a relatively young Law Enforcement Force, by encouraging Retirement through Financial Incintives.

In examining the Legislative history of the 1978 Amendments to the ADEA, it becomes apparent that Congress had not intended to hamper State and Local Law Enforcement Agencies. The Act contained and exception allowing employers:

1. To take any action otherwise prohibited under subsections (A), (B), (C) or (E) of this section where age is a bona fide Occupational Qualification reasonably necessary to the normal operation of the particular business, or where the diferentiation is based on reasonable factors other than age. 29U.S.C. 623 (F)(1) This is commonly termed BFOQ.

Unfortuneately, although Congress's intent is clear in the Legislative History, it was not explicitly stated in the Statute. Since the Statute appears clear and unambiguous on its face, Courts have not looked at the Legislative History. Consequently Law Enforcement has been treated as any other occupation by the Courts.

If Departments are denied the right to set their own Age Requirements there will be economic costs. All Government Bodies provide Pensions for Public Safety Officers who retire, with increased pensions going to Officers disabled in the Line of Duty. Keeping Officers on after their age has made it more difficult and hazardous for them to perform, increases the chance the Officer will be injuredwhile on duty. Physical tramas that can be absorbed by younger Officers may be major problems for older Officers. State and Local Governments, many of which are struggling to remain solvent, cannot afford to bear the extra costs of paying disability pensions to Officers who should have been retired earlier. Supreme Court Justice Powell was correct when he wrote in his concurrence on E.E.O.C. "Wyoming" " I also believe contrary to the popular view that the burdens imposed on the National Economy by Legislative Prohibitions against mandetory Retirement on account of AGE Excedes the potiential benefits.

In the experience of a majority of Public Safety Agencies, early retirement is viewed as a positive reward and is initially an incentive for employment. An early retirement with a very favorable pension is percieved by new employees as compensation for the rigors and demands of this stressful occupation. An Officers' growth in an Organization and his plans for the future hinge on the stability of retirement at a predetermined point in his life.

As Officers approach the age of compulsory Retirement or have completed the maximum number of years of service, they begin to fear leaving the security of the Workpalce they have gone to for 25 years or so. Early retirement and the job opportunities made available by it, which were once attractive, lose their appeal when weighed against the uncertainty of leaving. Yet it was precisely those things that made their careers as rewarding as they could be.

We in Indiana are very fortunate in that we have a close working relationship where the State Legislature ,Cities and Towns--Policemen and Firemen are all willing to sit down and work out situations which are of mutual interest to all.

In light of the above stated facts,the F.O.P. urges Congress to Pass S. 1240 only by exempting Law Enforcement from the ADEA will we be able to continue to provide our Nations Citizenry with the most qualified individuals to fulfull the mission of guarding the Public Safety.

Thank-you for giving our views your consideration.

The hearing is adjourned.

Senator **Nickles**. The hearing is adjourned.

Thank you very much.

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